United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

338

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Order of the
Securities and Exchange Commission

PETITION OF RESPONDENT SECURITIES AND EXCHANGE COMMISSION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INDEX

CITATIONS

Cases:

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In a novel application of the doctrine of judicial review, this Court has apparently held that whenever the Commission decides not to institute an injunctive action for alleged violation of its proxy rules, it must necessarily first make a legal determination that is reviewable in a court of appeals. 1/ This unnecessary judicial intrusion

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1/ Also, this Court may have misunderstood the fact that the Commission's records do not show that the Commission, as distinguished from its staff, had reached any legal opinion as to the propriety of the exclusion from Dow Chemical Company's proxy statement of the stockholder proposal involved.

We assume, in the light of the discussion at pages 27-28 of the Court's opinion, that this Court does not purport to hold reviewable a determination by the Commission not to give an opinion in the nature of a declaratory judgment or a determination by the Commission not to institute an enforcement proceeding in the district court.

into the administration of the Commission's proxy rules not only obliterates careful distinctions drawn by Congress between the Commission's authorization with respect to proxies under the Securities Exchange Act of 1934 and under the Public Utility Holding Company Act of 1935, with consequent confusion and impairment of enforcement procedures of benefit to corporate shareholders, but also impairs the effectiveness of private enforcement actions by which corporate shareholders have been enabled to vindicate their rights.

This Court's determination is at odds with the otherwise nearly unanimous recognition by courts and commentators of the informal, non-appealable nature of decisions made by the Commission with respect to enforcement of the proxy rules it has adopted under the Securities Exchange Act of 1934 [2/] and ignores the Commission's long-standing construction of its own procedural requirements. [3/] The rationale of

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2/ As to courts, see, e.g., Peck v. Securities and Exchange Commission, C.A. 2, No. 22,289, April 7, 1952; Leighton v. Securities and Exchange Commission, C.A. 2, No. 26,458, Nov. 3, 1960; Klastorin v. Roth, 353 F. 2d 182, 183 n.2 (C.A. 2, 1965); cf. J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); Securities and Exchange Commission v. Henwood, ['61-'64 Decisions] CCH Fed. Sec. L. Rep. ¶91,125 (S.D. Cal., 1961), modified on other grounds, 298 F. 2d 641 (C.A. 9), certiorari denied, 371 U.S. 814 (1962).

As to commentators, see, e.g., Aranow & Einhorn, Proxy Contests for Corporate Control 465 (2d ed., 1968); III Loss, Securities Regulation 1896 (1961), as supplemented, VI Loss at 4026 (1969); Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedures 189 (1955); 1 Davis, Administrative Law Treatise, Section 4.09 (1958); Clusserath, The Amended Stockholder Proposal Rule: A Decade Later, 40 N.D. Law. 13, 17, 42-43 (1964).

3/ Brief of Respondent in Support of Motion to Dismiss Petition for Review at pp. 11-15, Peck v. Securities and Exchange Commission, C. A. 2, No. 22,289, April 7, 1952; Brief of the Securities and Exchange Commission, amicus curiae, pp. 4-6 , Klastorin v. Roth, supra, n.2; cf. Letter of Byron D. Woodside,

(continued)

the decision will result in the creation of substantial procedural impediments to the pursuit of private remedies under the proxy rules that the Supreme Court, in J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), has found to be a "necessary supplement to Commission action"; consequently, it is contrary to that Court's mandate that in such cases unwarranted obstacles not be placed in the path of a private litigant, Mills v. Electric Autolite Co., 396 U.S. 375, 382 (1970). It will also severely limit future employment of the procedural mechanism through which the Commission has been able, without resort to direct legal action, informally to persuade persons filing proxy material to conform to the views of the Commission or its staff, including requirements with respect to the inclusion of stockholders' proposals that might otherwise have been rejected. The rationale of the opinion accepts as correct and is based upon this Court's construction of two district court decisions, Peck v. Greyhound Corp., 97 F. Supp. 679 (S.D. N.Y., 1951) and Union Pacific R. Co. v. Chicago & N.W. Ry. Co., 226 F. Supp. 400 408 (N.D. Ill., 1964), the first of which was not cited by the parties to this action for the proposition relied upon, and the second of which was not urged to be applicable in the manner held by this Court. Both, as applied, are in our view inconsistent with the above-cited Supreme Court decisions. This Court's opinion may also have failed to recognize that another case it cites as to the nature of the Commission's procedure, Dyer v. Securities and

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Director of the Commission's Division of Corporation Finance, ['52-'56 Transfer Binder] CCH Fed. Sec. L. Rep. ¶90,659 (March 4, 1954) at p. 92,003.

Exchange Commission, 291 F. 2d 774 (C.A. 8, 1961), involves a different statute and a different procedure.

1. By injecting the judiciary into any proxy dispute, this Court has, in effect, substituted its judgment for that of the Commission as to the merits of employing informal procedures for negotiating compliance with the proxy rules.

Section 14 of the Securities Exchange Act, 15 U.S.C. 78n, makes it unlawful for persons to solicit proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors . . . ." If these rules are violated the Commission's only meaningful remedy is to bring an injunctive action in a district court against the violator.

For the benefit of those who must comply with its proxy regulations, the Commission has adopted certain procedures to enable the Commission or its staff to attempt to persuade those required to comply to accept its views without the necessity of resorting to the available judicial remedy. Thus, preliminary copies of a proxy statement and accompanying material are required "to be filed with the Commission at least 10 days prior to the date definitive copies of such material are first sent or given to securityholders, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause therefor."[4/] Similarly, preliminary copies of additional soliciting material must be filed in advance with the Commission.[5/] And provision is also made for the subsequent filing of the "definitive

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4/ Rule 14a-6(a), 17 CFR 204.14a-6(a).

5/ Rule 14a-6(b), 17 CFR 240.14a-6(b).

copies" of these materials.[6] During the period subsequent to the filing of preliminary materials the rules contain an admonition that the printing of definitive copies be deferred "until the comments of the Commission's staff have been received and considered."[7] Usually the companies accede to the staff's suggestion unless they are able to convince the staff why the suggested changes should not be made. Should they not agree to make the changes ultimately requested, the Commission determines whether it should bring an injunctive action.

Where there is a proxy contest (e.g., there are opposition candidates for the board of directors), normally each side complains to the Commission's staff that the definitive material distributed by the other side to shareholders has violated the proxy rules, sometimes setting forth facts that may not theretofore have been known to the staff. In such situations the Commission or its staff may ask that correcting materials be sent out; if this is refused, the Commission determines whether it should seek an injunction.

The procedure is not dissimilar from that respecting the shareholder's proposals in this case. Among the rules adopted by the Commission, that involved in this case, Rule 14a-8, 17 CFR 240.14a-8, requires that a corporation's proxy soliciting material contain stockholder proposals, subject to certain exceptions. Under paragraph (d) of that rule, 17 CFR 240.14a-8(d), if the management asserts that a proposal may be omitted from its proxy statement, it must file the proposal with the Commission together with a statement of the reasons

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6/ Rule 14a-6(c), 17 CFR 240.14a-6(c).

7/ Note to Rule 14a-6, 17 CFR 240.14a-6.

why it deems the omission to be proper and a supporting opinion of counsel; it must also notify the securityholder of its intention to omit the proposal. In such a case, the staff will, of course, listen to the securityholder's arguments that the proposal should have been included, just as the staff will listen to arguments in a proxy contest that material sent out by the other side has been misleading, or the staff will hear any other charges of violation of statutes administered by the Commission. Whether or not the Commission is consulted by the staff in any of these situations depends on the circumstances or novelty of the problem and whether or not such consultation has been requested.

In any event, and independent of whether the Commission determines to bring an action to seek to enjoin activities violative of the proxy rules, it is clear that any person who claims to be injured by a proxy violation can bring such an action. In J. I. Case Co. v. Borak, supra, 377 U.S. 426, and Mills v. Electric Autolite Co., supra. 396 U.S. 375, the Supreme Court emphasized that the district courts are empowered to give all appropriate relief to a private litigant injured by a violation of the proxy rules.

Congress could have provided for a formal order to be issued by the Commission in proxy matters, and, indeed, did so in the year following the adoption of the Securities Exchange Act. In the Public Utility Holding Company Act of 1935, Section 12(e), 15 U.S.C. 79l(e), makes unlawful the solicitation of "any proxy, . . . regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission

deems necessary or appropriate for the protection of investors or consumers or to prevent the circumvention of the provisions of . . ." that Act "or the rules, regulations, or orders thereunder" (emphasis supplied). While the rules adopted under Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a), are made applicable with respect to certain solicitations under the Holding Company Act,[8/] it is provided that certain solicitations may not be made except pursuant to a declaration, upon which the Commission may order a hearing[9/] and that, if the Commission does "issue an order for a hearing on a declaration under this rule, such declaration shall become effective only pursuant to the further order of the Commission and subject to such terms and conditions as the Commission may prescribe."[10/] Since orders under the Holding Company Act may "be issued only after opportunityfor hearing,"[11/] in the latter situations a very different procedure is provided from the informal procedure otherwise applicable to proxy solicitations--a formal hearing or oppertunity therefor is contemplated and an order issues that is directly subject to court review.[12/] It was for violation of such an order that the Commission's action in Dyer v. Securities and Exchange Commission, supra, cited at pages 20 and 28 n.19 of this Court's opinion, was brought.

8/ Rule 61, 17 CFR 250.61.

9/ Rule 62(a) and (d), 17 CFR 250.62(a) and (d).

10/ Rule 62(e), 17 CFR 250.62(e).

11/ Section 20(c), 15 U.S.C. 79t(c).

12/ Section 24(a), 15 U.S.C. 79x(a).

This Court's opinion would appear to obliterate the careful distinction drawn by Congress and this Commission between the procedure under the Holding Company Act, whereby the Commission is authorized to enter an order, and the procedure under the Securities Exchange Act whereby the Commission is authorized merely to adopt rules.[13/]

2. The necessary consequence of this Court's decision is seriously to impair as a meaningful remedy private enforcement actions, which are the only means under the statute involved through which private rights can be vindicated, at least with respect to exclusion of a shareholder proposal from a particular proxy statement.

In our view, the plain import of J. I. Case Co. v. Borak, supra, and Mills v. Electric Autolite Co., supra, is that a shareholder whose proposal is rejected for inclusion in management's proxy materials has an unqualified right, with or without prior consultation with this Commission, to sue in an appropriate district court and obtain prompt resolution of his dispute with management--irrespective of any views that might be held by this Commission as to the merits. To be consistent with the opinions in those cases a district court is obliged to take such steps as might be necessary to assure an effective remedy--perhaps enjoining the distribution of management's proxy materials or the holding of a shareholders' meeting, together with any interim relief that might be suitable should management show an inclination toward unnecessary delay.

The basic assumptions upon which this Court's analysis of the question of reviewability is predicated place insuperable obstacles in the path of private litigants. Manifestly essential to the internal logic of the

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13/ The language of the Securities Exchange Act, rather than that of the Public Utility Holding Company Act, was used in the subsequently adopted Investment Company Act of 1940. See Section 20(a) thereof, 15 U.S.C. 80a-20(a).

decision are (1) that as a condition precedent to a private action a stockholder must first seek relief from the Commission[14/] and (2) that, if the Commission (or perhaps its staff) fails to agree with the shareholder as to the merits of his claim, such deference would or should be given by the district court to the Commission's failure to agree with the shareholder's view of the merits as effectively to shift the burden of proof from management to the shareholder (Slip Op. 13-14).[15/]

In support of the first proposition--the exhaustion doctrine--this Court relies (Slip Op. 13 n. 9, 20 and 34) solely upon Peck v. Greyhound Corp., supra, 97 F. Supp. 679.[16/] While we do not read that case as holding that the exhaustion doctrine is applicable,[17/] more significantly,

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14/ See Slip Op. 13:

> ". . . the Medical Committee has been forced to undergo a two-stage administrative proceeding compelled by the risk that failure to do so would preclude judicial relief by virtue of the exhaustion doctrine . . . ."

15/ This would apparently be true even though the burden is upon management to show it was entitled to rely upon an exception to the basic provision of Rule 14a-8 that shareholder proposals must be included. 19 Fed. Reg. 246 (1954); and see, e.g., Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 126 (1953).

16/ The only citation of this case by the parties was in the Medical Committee's brief (pp. 30-32). The case was not cited in support of the exhaustion doctrine but merely for the substantive conclusion that the Medical Committee's specific proposal did not fall within the exclusionary language of Rule 14a-8(c), 17 CFR 240.14a-8(c).

17/ The opinion itself recites that a decision had been made by the Commission. Until clothed in the mantle of respectability by this Court's decision herein, that case's contribution to the law was that of a "good example" of a "Court's misunderstanding of the Commission's informal review procedure . . . ." Aranow & Einhorn, Proxy Contests for Corporate Control, 465 n. 9 (2d ed. 1968). It is appropriate here to note that in the year following the district court's decision, Mr. Peck, having undeniably exhausted whatever

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for reasons discussed below, we think application of such a doctrine would serve no useful purpose and would undermine the value of private rights of action upheld in the Supreme Court cases we have cited.

Application of the exhaustion doctrine in the present context incorrectly assumes that the Commission, rather than acting in the public interest, must champion the cause of individual shareholders and provide a proper forum for the vindication of their rights. Thus, the purpose of the Commission's enforcement of Rule 14a-8 is not designed to protect a particular shareholder with respect to a particular proposal submitted for inclusion in a particular proxy statement, but rather is to protect, generally, the rights of all shareholders to have such proposals included in the proxy statement where appropriate, while avoiding the confusion and expense of including a potential multitude of inappropriate shareholder proposals.[18/]

This Court's view that in a private action a shareholder who had failed to persuade the Commission of the merits of enforcement action would have the "burden . . . of overcoming" the 'adverse Commission determination"--its second basic premise--is supported only by citation to

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17/ (continued)
remedies this Court now assumes to exist, found his petition for review of the Commission's decision as to his stockholder proposal summarily dismissed by the Court of Appeals for the Second Circuit:

> "A motion having been made . . . to dismiss the petition for review for lack of jurisdiction . . . said motion . . . is granted . . . ." Peck v. Securities and Exchange Commission (C.A. 2, No. 22,289, April 7, 1952) (emphasis added).

18/ Through its filing requirement, Rule 14a-8 assures that the Commission will be informed of any dispute over the inclusion of a shareholder proposal in proxy material. Should it find a need for further information which is not voluntarily submitted, it has investigative power adequate to compel its production. Securities Exchange Act, Section 21(a), 15 U.S.C. 78u(a). And should it find enforcement action appropriate in the public interest no self-serving prompting by private individuals will be required.

Union Pacific R. Co. v. Chicago & N.W. Ry. Co., 226 F. Supp. 400, 408 (N.D. Ill., 1964). That case holds, as do others, that deference should be accorded the Commission's interpretation of its own rules.[19/] But a conclusion whether or not to institute a proceeding, which may involve a determination as to the meaning of a rule, is not entitled to the same weight as a determination of an agency in a proceeding held for the purpose of adjudicating rights. As was observed by Judge Learned Hand in Fishgold v. Sullivan Drydock & Repair Corp., 154 F. 2d 785 (C.A. 2), affirmed, 328 U.S. 275, 290 (1946),

> ". . . the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present this case for the side which he represents, and leave decision to the court . . . upon which lies the responsibility of decision . . . . Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative . . . ."

See also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Certainly,

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19/ It was cited in our brief (pp. 20-21) for the proposition that this Court should give deference to the Commission's interpretation of its procedures under Rule 14a-8.

While looking "to the Commission's rules" as a source upon which to base its analysis of what it considered to be a close question of procedural formality (Slip Op. 15), this Court, although urging deference for other purposes, inexplicably fails to give any probative significance whatever to the Commission's view of its own procedures as being purely informal and advisory in nature. This is all the more surprising since prior to this decision, so far as we are aware, the Commission's construction was universally accepted as correct, see nn. 2-3, supra; cf. Slip Op. 9 n.5. In this connection, it may be noted that aside from the single filing requirement of Rule 14a-8(d), this Court cites no additional element of the "elaborate procedures" to which it refers (Slip Op. 21) other than the "possibility" of submitting legal arguments to the Commission (Slip Op. 19).

where a private party sues to vindicate his rights, any conclusion of this character that may have been reached by the Commission is, in any event, entitled to no greater weight adverse to the shareholder who sues than would be appropriate in favor of the Commission in an action brought by the Commission itself.

It would appear that a shareholder is, by virtue of this Court's decision, now compelled to endure not merely a two-stage administrative procedure--which was heretofore an available option--but may, as well, be obliged to pursue a third stage of appellate review and a fourth stage upon remand, with the prospect of a private enforcement action against his true adversary still in the offing. Thus, the decision seems to create, rather than to avoid, a circuitous path to resolution of the ultimate controversy. Not only is resort to the district court in the first instance a more direct approach, but there is ample reason to find that a district court is no less qualified than the Commission, and better qualified than a court of appeals, to resolve in the first instance the type of controversy which normally arises under Rule 14a-8. 20/

20/ The Commission has no special expertise on questions of state law which are frequently raised in connection with these matters, since a proposal inappropriate for shareholder consideration under state law may be excluded, see Rule 14a-8(c)(1), 17 CFR 240.14a-8(c)(1). Likewise, a district court is no less capable than the Commission to resolve whether the proposal requests action "relating to the conduct of the ordinary business operations of the issuer," Rule 14a-8(c)(5), 17 CFR 240.14a-8(c)(5). The remaining three exemptions implicitly involve factual issues. They are designed to protect shareholders generally from the tyranny of a single individual among them who may seek to employ the proxy statement as a platform from which to broadcast personal views and beliefs under the guise of promoting the general corporate welfare. Thus, where no substantial support has been attained in the past, a shareholder may be precluded from again offering an otherwise proper proposal, see Rule 14a-8(c)(4), 17 CFR 240.14a-8(c)(4). Similarly, if the proponent has failed to appear to

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It should be noted also that the "pragmatic considerations" (Slip Op. 12) advanced, as well as the other factors relied upon by this Court, would seem in reason to apply equally as in the present case to a petition for review which may hereafter be filed by a corporate management "aggrieved" by a determination that enforcement action would be appropriate in a particular case. 21/ Presumably, therefore, even where a shareholder has indeed convinced the Commission of the apparent merits of his position, the consequence of this Court's decision will, once again, through delay of an intervening appeal, serve to defeat his purpose. And it is by no means certain that on the basis of the present decision management might not be able to delay enforcement action by the Commission itself through a petition to review the merits of the legal decision upon which that action is based filed in anticipation of an injunctive action.

20/ (continued)

present his proposal for consideration at a prior meeting it may be excluded notwithstanding its propriety in other respects, see Rule 14a-8(c)(3), 17 CFR 240.14a-8(c)(3). And, finally, where it "clearly appears" that his primary purpose is not to serve the corporate good but instead to enforce a personal claim or to redress a personal grievance or primarily to promote some other more general objective, that too may be excluded without regard to the intrinsic merits of the proposal. Rule 14a-8(c)(2), 17 CFR 240.14a-8(c)(2).

21/ While it might otherwise be urged that review of the legal element of that decision may be had in an action brought by the Commission, the Commission may, as this Court suggests (Slip Op. 27-28), even in such circumstances decline for administrative reasons to sue. This Court's analysis would, therefore, imply that unless direct review could be obtained in a court of appeals, management might suffer from the suggested burden in a private action of overcoming the deference said to be due the Commission's legal decision.

3. The Commission's responsibility on remand is unclear.

By its mandate this Court directs the Commission "reconsider"(Slip Op. 41) the determination it "ostensibly" made (Slip Op. 27) as to the application of its proxy rules to the Medical Committee's resolution. But since, as this Court has been advised, the present membership of the Commission cannot determine the basis upon which the Commission determined earlier "to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee . . . ,"[22/] the mandate seemingly requires this Commission to issue an opinion in the nature of a declaratory judgment, although the decision whether to render such a judgment rests "in its sound discretion." 5 U.S.C. Section 554(e).

The status of such a Commission opinion is unclear. It can hardly be binding upon management, which was not a party to this appeal, and which is entitled to defend its position in the district court should an action be brought either by the Commission or the shareholder. It should not be binding upon the shareholder who should be free to pursue a prompt and effective remedy in the district court rather than having to seek further appellate review with respect to the content of the Commission's opinion.

22/ It was because the Commission did not believe it had taken any position that the Commission presented no argument on the merits to this Court, not because it had not "deigned" to do so (Slip Op. 30).

A similar misunderstanding by this Court of the Commission's position relates to the "vacillation" (Slip Op. 7) of the Commission as to its argument that the petition for review had not been filed within the jurisdictional time period. While feeling obliged to bring this jurisdictional question to the Court's attention, we did not press the point in our original motion because at that time counsel was not aware, as it was when the renewed motion was made, that the Medical Committee had been fully apprised of the Commission's determination by telephone on the date it was made.

CONCLUSION

In the light of the foregoing discussion, we believe this Court should reconsider its determination; and, because of the importance of this decision, we suggest that it is an appropriate case for the reconsideration of the Court en banc.

Respectfully submitted,

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Securities and Exchange Commission
Washington, D.C. 20549

AUGUST 1970.

2644

JOINT APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION
Respondent

ON PETITION TO REVIEW AN ORDER OF
THE SECURITIES AND EXCHANGE COMMISSION

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Attorney for Medical Committee
for Human Rights

MEDICAL COMMITTEE FOR HUMAN RIGHTS

CHAIRMAN'S OFFICE
RECEIVED
MAR 15 1968
SEC. & EXCH. COMM.

March 11, 1968

Secretary
Dow Chemical Company
General Office Building
2030 Abbott Road Center
Midland, Michigan 48640

Dear Sir:

The Medical Committee for Human Rights, through a generous gift, has become owner of shares in Dow Chemical Company. While we are pleased to be beneficiaries of such support, it has been called to our attention that at least one of the products manufactured by our company raises moral and ethical questions pertinent to the goals of the Medical Committee for Human Rights.

I refer, of course, to the production of napalm. After consultation with the executive body of the Medical Committee, I have been instructed to request an amendment to the charter of our company, Dow Chemical. We have learned that we are technically late in asking for an amendment at this date, but we wish to observe that it is a matter of such great urgency that we think it is imperative not to delay until the shareholders' meeting next year. We respectfully request that this proposal be included in the proxy statement which will be sent to the shareholders informing them of the matters to be considered at the meeting of May 8, 1968.

We hope you will be able to comply with this request, though late, because delay could result in the horrible death and suffering of thousands of civilians inflicted by our product, particularly in Vietnam, but not only there. Should you be unable to consider this request for technical reasons, we might have to turn to other shareholders to obtain a special shareholders' meeting to consider the proposal. This unnecessary expense could be avoided if our proposed amendment is simply

included at this time for this year's annual meeting.

We respectfully propose the following wording to be sent to the shareholders:

> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

Further, while we do not wish to propose the precise wording that the proposed amendment by the Board of Directors should take, for the benefit of the Board, we suggest it might be helpful to have the following proposed amendment to the Composite Certificate of Incorporation for their assistance and guidance:

> "RESOLVED, that Article III of the Composite Certificate of Incorporation of the Dow Chemical Company be and is hereby amended to include Clause (K) which provides as follows: '(K) But none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings.'"

Finally, we wish to note that our objections to the sale of this product is primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for our company's business as it is being used in the Vietnamese War. It is now clear from company statements and press reports that it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth. There is, as well, an adverse impact on our global business, which our advisers indicate, suffers as a result of the public reaction to this product.

I trust that the amendments will be handled expeditiously. In any event, we request the amendments be prepared for 1969 consideration if the Board feels it cannot handle the issue in 1968.

Sincerely yours,

Quentin D. Young

cm

Quentin D. Young, M.D.
National Chairman,
Medical Committee for
Human Rights

CC: President, Dow Chemical Company
General Counsel, Dow Chemical Company
Chairman, Securities and Exchange Commission

THE DOW CHEMICAL COMPANY

GENERAL OFFICE BUILDING
2030 ABBOTT ROAD CENTER
MIDLAND, MICHIGAN 48640

March 21, 1968

Quentin D. Young, M.D.
National Chairman
Medical Committee for Human Rights
1512 East 55th Street
Chicago, Illinois 60615

Dear Dr. Young:

This will reply to your letter of March 11 in which you propose an amendment to our Certificate of Incorporation to insert limitations on the sale of napalm.

Your letter has arrived too late for the proposal to be considered in connection with the annual meeting of May 8, 1968, as the proxy statement has already been printed and it must be mailed forthwith to security holders so that they may have ample notice of the meeting in time to return their proxies.

With regard to your request that the proposal be considered for the 1969 annual meeting, we will study the matter and will communicate with you later this year.

Sincerely yours,

W. A. Groening, Jr.
General Counsel

cc: H. D. Doan, President
H. H. Dow, Secretary

Securities and Exchange Commission
Att'n: Mr. Donald Lewis, Branch Chief

March 26, 1968

Mr. W. A. Groening, Jr.
General Counsel
The Dow Chemical Company
2030 Abbott Road Center
Midland, Michigan 48640

Dear Mr. Groening:

I have received your reply to my letter of March 11th. I am, of course, very disappointed that my proposed amendment was not prepared for the proxy statement which will be mailed forthwith to securities holders. As I stated on March 11th, the matter in question is of extraordinary importance. A year's delay in changing our charter will almost certainly result in our product burning thousands of civilians, many of them to death. But, as I also emphasized in my communication, it is obvious that the company is suffering in two practical ways additionally: We are not attracting the top college graduates because of their shared concern over the use of our product; and, sales at home and abroad are doubtless adversely affected by the bad reputation the use of our product has engendered.

Therefore, I believe I can urge that you promptly mail the brief proposed amendment to all security holders. Assembling a special meeting for this purpose would be costly.

Please send me a list of security holders in our company.

Sincerely,

Quentin D. Young, M.D.
National Chairman,
Medical Committee for
Human Rights

cc: H. D. Dean, President
H. H. Dow, Secretary
Securities and Exchange Commission
Att'n: Mr. Donald Lewis, Branch Chief

MEDICAL COMMITTEE FOR HUMAN RIGHTS

1512 East 55th Street / Chicago, Illinois 60615 Phone: MU4-3951 Chairman: Jane Kennedy, R.N., M.S.

CHICAGO
CHAPTER

January 6, 1969

Mr. W. A. Groening, Jr., General Counsel
Dow Chemical Company
2030 Abbott Road Center
Midland, Michigan 48640

Dear Mr. Groening:

On March 21, 1968 you informed me that a proposed amendment to our Certificate of Incorporation to insert limitations on the sale of napalm in connection with the annual meeting on May 8, 1968, was submitted too late to be included in the proxy statement, which was being mailed forthwith to security holders. You closed your letter: "With regard to your request that the proposal be considered for the 1969 annual meeting, we will study the matter and will communicate with you later this year." I am, of course, distressed that 1968 has passed without our having received a single word from you on this important matter.

Be that as it may, I would at this time once again respectfully request that our proposal be included in the proxy statement which will be sent to shareholders informing them of matters to be considered at the 1969 meeting. In addition to the cogent reasons enumerated last year, we find even more compelling feature of peace negotiations, which may well make termination of the use of our products against humans a reality, at least in Vietnam. This fact constitutes an opportunity which can go far toward restoring the image of our Company.

By submitting this amendment sufficiently in advance of the mailing to shareholders, we trust there can now be no obstacle to permitting the shareholders to express themselves.

For your convenience, I am stating once again the proposal you were unable to send out last year:

"RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

Further, while we do not wish to propose the precise working that the proposed amendment by the Board of Directors should take, for the benefit of the Board, we suggest it might be helpful to have the following proposed amendment to the Composite Certificate of Incorporation for their assistance and guidance:

"RESOLVED, that Article III of the Composite Certificate of Incorporation of the Dow Chemical Company be and is hereby amended to include Clause (K) which provides as follows: '(K) but none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings.'"

Sincerely yours,

Quentin D. Young, M.D.
Member, Executive Committee
Medical Committee for Human Rights

cm
CC: Mr. H. D. Doan, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Securities and Exchange Commission, Attention: Mr. Donald -Lewis, Branch Chief
T.G.G. Wilson, M.D., Ph.D., National Chairman, Medical Committee for Human Rights

WILLIAM A. CROENING, JR.
ATTORNEY AND COUNSELLOR AT LAW
MIDLAND, MICHIGAN

January 17, 1969

Mr. Herbert H. Dow
Secretary
The Dow Chemical Company
Midland, Michigan 48640

Dear Mr. Dow:

You have received from Dr. Quentin D. Young, Member of the Executive Committee of the Medical Committee for Human Rights, a copy of his letter to me dated January 6, 1969, setting forth a proposal that Article III of the Composite Certificate of Incorporation of The Dow Chemical Company be amended by the addition of a clause (k) to read as follows:

> "but none of the following clauses shall be taken to --authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings."

I have reviewed the proposal of the Medical Committee for Human Rights in the light of Regulation 14A of the Securities and Exchange Commission and especially Rule 14a-8(c) which sets forth five circumstances under which the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy.

Rule 14a-8(c)(5) permits such omission

> "If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

It is my opinion that the determination of the products which the Company shall manufacture, the customers to which it shall sell the products, and the conditions under which it shall make such sales are related to the conduct of the ordinary business operations of the Company and that any attempt to amend the Certificate of Incorporation to define the circumstances under which the management of the Company shall make such determinations is contrary to the concept of corporate management, which is inherent in the Delaware General Corporation Act under which the Company is organized. Moreover,

there is considerable doubt as to the efficacy of the proposed limitation in the context of the ability of the Government of the Unites States to issue a directive that the Company manufacture napalm. Therefore, the proposed limitation could conceivably be contrary to the requirements of the Defense Production Act of 1950.

Rule 14a-8(c)(2) provides for omission of a proposal

> "If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

It is a well-known fact that the Company has been the target of protests and demonstrations for the past few years at its office and plant locations, and on the occasion of recruiting on college and university campuses, as well as at its annual meeting of stockholders held May 8, 1968. The various protests and demonstrations are a reflection of opposition on the part of certain segments of the population against the policy of the United States Government in waging the war in Viet Nam. Although The Dow Chemical Company was not among the 100 largest prime contractors with the Department of Defense during the 1967-68 Government fiscal year and was only 75th on the list in the 1966-67 fiscal year, it appears to have been singled out symbolically by the protesters. Under all of these circumstances it is my opinion that it clearly appears that the proposal is primarily for the purpose of promoting a general political, social or similar cause.

In conclusion, it is my opinion that under Rules 14a-8(c) (2) and (5) the Company may omit the proposal of the Medical Committee for Human Rights from its proxy statement for the annual meeting of stockholders to be held May 7, 1969.

Sincerely yours,

W. A. Groening, Jr.

THE DOW CHEMICAL COMPANY

MIDLAND, MICHIGAN 48640

January 17, 1969

RECD-S.E.C.

JAN 22 1969

Dr. Quentin D. Young
Member, Executive Committee
Medical Committee for Human Rights
1512 East 55th Street
Chicago, Illinois 60615

Dear Dr. Young:

This will reply to your letter of January 6 addressed to Mr. W. A. Groening, Jr.

We intend to omit your proposal from our proxy statement and form of proxy for our annual meeting of stockholders to be held May 7, 1969. Enclosed is a copy of our letter to the Securities and Exchange Commission setting forth the statement of reasons why we deem the omission of the proposal to be proper. In support of same we also enclose a copy of Mr. Groening's opinion as General Counsel of the Company.

Sincerely yours,

Herbert H. Dow
Secretary

Enclosures

cc: H. D. Doan

[11a]

THE DOW CHEMICAL COMPANY

MIDLAND, MICHIGAN 48640

January 17, 1969

Securities and Exchange Commission
500 North Capitol Avenue
Washington, D. C. 20549

Re: File No. 1-3433

Gentlemen:

I enclose herewith a proposal of the Medical Committee for Human Rights pertaining to a question to be submitted at our 1969 annual meeting. Also enclosed is the opinion of Mr. W. A. Groening, Jr., General Counsel of our Company, concerning the status of the proposal under Rule 14a-8(c) of the Securities and Exchange Commission.

For the reasons set forth in Rule 14a-8(c) (2) and (5), The Dow Chemical Company intends to omit the proposal from its proxy statement and form of proxy for its annual meeting of stockholders to be held May 7, 1969.

A copy of this letter and of Mr. Groening's opinion is being forwarded to the Medical Committee for Human Rights.

Sincerely yours,

Herbert H. Dow
Secretary

Enclosures

cc: Medical Committee
for Human Rights
1512 E. 55th St.
Chicago, Ill. 60615

THE DOW CHEMICAL COMPANY

GENERAL OFFICE BUILDING
2030 ABBOTT ROAD CENTER
MIDLAND, MICHIGAN 48640

January 24, 1969

Mr. M. E. Jaffe
Securities and Exchange Commission
500 North Capitol Avenue
Washington, D. C. 20549

Re: File No. 1-3433

Dear Mr. Jaffe:

--Pursuant to our telephone conversation of this morning I am enclosing a copy of the proposal of the Medical Committee for Human Rights which was inadvertently omitted from enclosure with our letter of January 17 to the Commission.

You will note that the proposer sent a copy of his letter to the attention of Mr. Donald Lewis.

Sincerely yours,

W. A. Groening, Jr.
General Counsel

Enclosure

MEDICAL COMMITTEE FOR HUMAN RIGHTS

1512 East 55th Street / Chicago, Illinois 60615 Phone: MU4-3951 Chairman: Jane Kennedy, R.N., M.S.

CHICAGO CHAPTER

February 3, 1969

Mr. W. A. Groening, Jr.
General Counsel
Dow Chemical Company
2030 Abbott Road Center
Midland, Michigan 48640

Dear Mr. Groening:

Enclosed is a new request by the Medical Committee for Human Rights for a proposal to be included by the management of our company's proxy statement, along with a copy of a letter which we have sent to the Securities and Exchange Commission.

Sincerely yours,

Quentin D. Young

Quentin D. Young, M.D.
Member, Executive Committee
Medical Committee for Human Rights

MEDICAL COMMITTEE FOR HUMAN RIGHTS

1512 East 55th Street / Chicago, Illinois 60615 Phone: MU4-2951 Chairman: Jane Kennedy, R.N., M.S.

CHICAGO CHAPTER

Mr. W. A. Groening, Jr.
General Counsel
Dow Chemical Company
2030 Abbott Road Center
Midland, Michigan 48640

Dear Mr. Groening:

On behalf of the Medical Committee for Human Rights, I would like to thank you for your gracious consideration of the Committee's proposed resolution to be submitted to our company's shareholders.

We were disappointed to discover that in your legal memoranda for Mr. Dow you misconstrued the nature of our request. In order to make the purpose of our proposal very clear, and to meet certain of the objections to our proposal which were implied by your memo, we are submitting our proposal in a somewhat revised form with the expectation that the management will agree to include our proposed resolution in the proxy statement to be sent to stockholders for the annual meeting to be held on May 7, 1969.

Your memo to Mr. Dow is devoted to a consideration of the "proposal that Article III of the Composite Certificate of Incorporation of the Dow Chemical Company be amended by the addition of a Clause 'K'," which you then quote. We have made no such proposal to Dow, nor would we presume to serve as draftsmen for an amendment to the corporate charter. As we said in our letter of March 11, 1968, and repeated in our letter of January 6, 1969, "we do not wish to propose the precise wording that the proposed amendment by the Board of Directors should take." For the Board's benefit we did offer some language which it could use or reject, as it saw fit, in considering our proposal. But I must inform you that we were somewhat disappointed that your memo to Mr. Dow dwelt on a proposal which we did not make and failed even to discuss the proposal which we said that we would like to have included in the proxy statement.

Quite simply, we proposed that the shareholders of Dow request the company's Directors to consider the advisability of adopting an amendment, to the purposes' section of the corporate charter. We are convinced that our company's sale of napalm has damaged the company financially, and that it is outside of the scope of business in which the company's owners would like Dow to be engaged. We are willing to bend, however, to your belief that the management should be allowed to decide to whom and under what conditions it will sell its products. Nevertheless, we are certain that you would agree that the company's owners have not only the legal power but also the historic and economic obligation to determine what products their company will manufacture. Therefore, with the hope that you will find our revised proposal suitable for submission to the stockholders, requesting the Directors to consider the advisability of adopting an amendment to the corporate charter forbidding the company to make napalm (any such amendment would, of course, be subject to the requirements of the "Defense Production Act of 1950," as are the corporate charters and management decisions of all United States Corporations), we request that the following resolution be included in this year's proxy statement:

"RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

Sincerely yours,

Quentin D. Young

Quentin D. Young, M.D.,
Member, Executive Committee
Medical Committee for Human Rights

CC: Mr. H. D. Dow, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Securities and Exchange Commission, Attn: Mr. Donald Lewis
T.G.G. Wilson, M.D., Ph.D., National Chairman, Medical Committee for Human Rights

MEDICAL COMMITTEE FOR HUMAN RIGHTS
1512 East 55th Street / Chicago, Illinois 60615 Phone: MU4-3951 Chairman: Jane Kennedy, R.N.
CHICAGO CHAPTER

February 3, 1969

Securities and Exchange Commission
Washington, D.C.

Attention: Mr. Donald Lewis

Dear Mr. Lewis:

Enclosed is a copy of a request for a resolution to be included by the Dow Chemical Company in its proxy statement for the annual meeting of stockholders to be held on May 7, 1969, pursuant to Rule 14A-8. We hope that the management will agree to include this proposal in its proxy statement.

Should Dow decide to omit the proposal, however, we request a staff review of Dow's decision. If the staff agrees with Dow's decision to omit the proposal, we request an oral argument before the Commission itself.

Sincerely yours,

Quentin D. Young, M.D.
Member, Executive Committee
Medical Committee for Human Rights

Encl.

THE DOW CHEMICAL COMPANY

MIDLAND, MICHIGAN 48640

February 7, 1969

RECD-S.E.C.

FEB 10 1969

Securities and Exchange Commission
500 North Capitol Avenue
Washington, D. C. 20549

Re: File No. 1-3433

Gentlemen:

I enclose copies of three letters from the Medical Committee for Human Rights, two of them being addressed to our General Counsel, Mr. W. A. Groening, Jr. and the third being a copy of a letter addressed to Mr. Donald Lewis of the Securities and Exchange Commission. Also enclosed is the opinion of Mr. Groening commenting on the same.

For the reasons set forth in Rules 14a-8(a) and 14a-8(c)(2) and (5) we intend to omit the proposal from our proxy statement and form of proxy for our annual meeting of stockholders to be held May 7, 1969.

A copy of this letter and of Mr. Groening's opinion is being forwarded to the Medical Committee for Human Rights.

Sincerely yours,

Herbert H. Dow
Secretary

Enclosures

cc: Herbert D. Doan

Medical Committee
for Human Rights
1512 E. 55th St.
Chicago, Ill. 60615

SECURITIES AND EXCHANGE COMMISSION
RECEIVED
FEB 1 1969
DIVISION OF CORPORATION FINANCE

WILLIAM A. GROENING, JR.
ATTORNEY AND COUNSELLOR AT LAW
MIDLAND, MICHIGAN

February 7, 1969

Mr. Herbert H. Dow
Secretary
The Dow Chemical Company
Midland, Michigan 48640

Dear Mr. Dow:

You have received a copy of the letter from the Medical Committee for Human Rights signed by Dr. Quentin D. Young dated February 3, 1969, and addressed to me in which he sets forth the following resolution to be included in the proxy statement for the Company's 1969 annual meeting:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

Dr. Young's letter states that I have misconstrued the nature of the request set forth in his letter of January 6 and he offers new wording because of that. My opinion to you of January 17 was not concerned with the form or wording of the proposal but was concerned with the substance of the matter involved. The new proposal, if in fact it is a new proposal, is subject to the same substantive comments as were set forth in my letter of January 17 and I, therefore, reaffirm my opinion of that date that under Rules 14a-8(c) (2) and (5) the proposal, whether in the form set forth in Dr. Young's letter of January 6 or in the form set forth in his letter of February 3, is one that the Company may omit from its proxy statement for the forthcoming annual meeting of stockholders.

If, in fact, the proposal set forth in the letter of February 3 is a new proposal rather than a restatement of the first proposal, it is one which under Rule 14a-8(a) may be omitted because it has not been submitted at least 60 days in advance of a day corresponding to the first date on which our proxy soliciting material was released to security holders in connection with last year's annual meeting. That date last year was March 25, 1968.

Sincerely yours,

W. A. Groening, Jr.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FEB 18 1969

Mr. Herbert H. Dow
Secretary
The Dow Chemical Company
Midland, Michigan 48640

Re: File No. 1-3433

Dear Mr. Dow:

This is with respect to the proposal submitted by Dr. Quentin D. Young in a letter to your company dated January 6, 1969, concerning an amendment to the Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings for inclusion in the proxy material for the 1969 annual meeting of shareholders.

For reasons stated in your letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy material for the Company's annual meeting pursuant to Rules 14a-8(c)(2) and 14a-8(c)(5) under the Securities Exchange Act of 1934.

Sincerely yours,

Courtney Whitney
Chief Counsel
Division of Corporation Finance

cc: Dr. Quentin D. Young
Member, Executive Committee
Medical Committee for Human Rights
1512 East 55th Street
Chicago, Illinois 60615

MAILED
FEB 18 1969
SEC. FILE PROCESSING SECTION

FEB 18 1969

Dr. Quentin D. Young
Member, Executive Committee
Medical Committee for Human Rights
1512 East 55th Street
Chicago, Illinois 60615

Re: The Dow Chemical Company
File No. 1-3433

Dear Dr. Young:

This is with regard to the proposal concerning an amendment to the Composite Certificate of Incorporation of The Dow Chemical Company to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings which you submitted in your letter to Dow Chemical Company dated January 6, 1969. Enclosed is a copy of our letter to the Company, indicating that this Division will not recommend any action to the Commission if your proposal is omitted from the Company's proxy soliciting material.

Sincerely yours,

Courtney Whitney
Chief Counsel
Division of Corporation Finance

Enclosure:
Carbon copy of letter

THE DOW CHEMICAL COMPANY

GENERAL OFFICE BUILDING
2030 ABBOTT ROAD CENTER
MIDLAND, MICHIGAN 48640

February 28, 1969

SEC-S.E.C.

MAR 2 - 1969

Securities and Exchange Commission
500 North Capitol
Washington, D.C. 20549

Re: File No. 1-3433

Gentlemen:

Pursuant to Rule X-14A-6 under the Securities Exchange Act of 1934, we submit herewith five preliminary copies each of the proposed proxy statement and form of proxy, plus one copy of the proxy statement marked to show changes, pertaining to the annual meeting of stockholders of The Dow Chemical Company scheduled for Wednesday, May 10, 1969.

Present plans are to commence mailing this material to the holders of Common Stock on March 20, 1969.

Your attention is directed to the fact that the number of shares to be outstanding at the close of business March 10, 1969, is unknown at the present time because of the possibilities of debenture conversions and exercise of employee options. This figure will, of course, be filled in prior to final printing. For your information, the number of shares outstanding and entitled to vote at the close of business January 31, 1969, was 30,234,537, excluding the 1,000,000 issued shares held by the Company as treasury stock.

Proxies were submitted with respect to the prior year's annual meeting in accordance with the Securities and Exchange Commission's proxy rules. Copies of all proxy solicitation material were filed with you over my signature under date of March 22, 1968.

The proposed proxy statement differs from last year's proxy statement in the following particulars:

1. There is one change in the Board of Directors. The retirement of Earl W. Bennett from the Board is discussed and G. J. Williams, recently appointed to the Board, is presented as a new nominee.

2. Under the caption "Remuneration and Retirement Benefits, and Transactions with Officers and Directors", information concerning dividend units and options has been removed but has been included in the description of Proposal No. 3 under the caption "The Dow Chemical Company Award Plan".

3. Proposals No's. 1, 2 and 3 have been added to this year's proxy statement as have Exhibits A, B and C, all of which relate to the same. Because of the presentation of these proposals the form of proxy differs from last year, affording the stockholders the opportunity to vote separately upon each proposal and to vote separately for or against the election of directors.

4. Under the caption "Other Matters" reference is made to a proposal of a stockholder which the Company has omitted pursuant to its letter to the Commission dated January 17, 1969, to which the Chief Counsel of the Division of Corporation Finance responded under date of February 18, 1969.

If any representative of the Commission wishes to discuss any of the matters pertaining to the proxy statement and form of proxy, I shall be glad to accept a collect telephone call. My number is Area Code 517, 636-1957. If I should be absent, Mr. R. W. Barker, Assistant General Counsel, could take the call in my place.

Sincerely yours,

W. A. Groening, Jr.
General Counsel

Enclosures

THURMAN ARNOLD
PAUL A. PORTER
MILTON V. FREEMAN
NORMAN DIAMOND
WILLIAM L. MCGOVERN
CAROLYN E. AGGEN
LOUIS EISENSTEIN (1915-1966)
C. DUANE VIETH
VICTOR H. KRAMER
GREED MILLER
ADE KRASH
WILLIAM D. ROGERS
B. HOWELL MILL
JULIUS M. GROSSMAN
EDGAR H. BRENNER
DENNIS G. LYONS
STUART J. LAND
ROBERT E. HERZSTEIN
JAMES R. MCALEE
WALTER J. ROCKLER
WERNER KRONSTEIN
PAUL S. BERGER
JOHN T. RIGBY
E. WILLIAM HENRY
JAMES F. FITZPATRICK
MELVIN C. GARSON

ARNOLD & PORTER
1229 NINETEENTH STREET, N.W.
WASHINGTON, D. C. 20036
223-3200

BRUCE L. MONTGOMERY
JOHN D. HAWKE, JR.
MURRAY N. BRING
PRISCILLA HOLMES
ARTHUR E. STROUT
DANIEL A. REZNECK
JOHN A. CIENLEK
GERALD M. STERN
RICHARD S. EWING
MELVIN SPAETH
RICHARD L. BACON
HARRY HUGE
CHARLES R. HALPERN
DAVID R. KENTOFF
DAVID M. LLOYD
MURRAY S. WEDER
JACK L. LIPSON
ARMISTEAD W. GILLIAM, JR.
PETER K. BLEAKLEY
ALEXANDER E. BENNETT
JEROME L. CHAPMAN
MICHAEL SCHNEIDERMAN
DANIEL P. LEVITT
REID P. CHAMBERS

Dolby Fund
2-24-69

February 28, 1969

CABLE ADDRESS
"ARFOPO"

Securities and Exchange Commission
500 North Capitol Street, N. W.
Washington, D. C. 20549

Attention: Courtney Whitney, Jr., Esq.,
Chief Counsel, Division of
Corporation Finance

Gentlemen:

Enclosed is a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER

By Jeffrey D. Bauhan
Jeffrey D. Bauhan

Enclosure

THURMAN ARNOLD
PAUL A. PORTER
MILTON V. FREEMAN
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1229 NINETEENTH STREET, N.W.
WASHINGTON, D. C. 20036
223-3200

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PETER K. BLEAKLEY
ALEXANDER C. BENNETT
JEROME I. CHAPMAN
MICHAEL SCHNEIDERMAN
DANIEL P. LEVITT
REID P. CHAMBERS

February 28, 1969

Securities and Exchange Commission
500 North Capitol Street, N. W.
Washington, D. C. 20549

CABLE ADDRESS
"ARFOPO"

Attention: Mr. Donald L. Lewis, Branch Chief,
Division of Corporation Finance

Gentlemen:

Enclosed are 20 copies of a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER

By Jeffrey D. Bauman
Jeffrey D. Bauman

Enclosures

ARNOLD & PORTER

1229 NINETEENTH STREET, N.W.

WASHINGTON, D.C. 20036

223-3200

THURMAN ARNOLD
PAUL A. PORTER
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JOHN T. RIGBY
WILLIAM HENRY
JAMES F. FITZPATRICK
CALVIN C. GARBOW

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PETER K. BLEAKLEY
ALEXANDER C. BENNETT
JEROME I. CHAPMAN
MICHAEL SCHNEIDERMAN
DANIEL P. LEVITT
REID P. CHAMBERS

February 28, 1969

Securities and Exchange Commission
500 North Capitol Street, N. W.
Washington, D. C. 20549

CABLE ADDRESS
"ARFOPO"

Gentlemen:

We are counsel for the Medical Committee for Human Rights ("Medical Committee") in connection with a proposed resolution to be included in the proxy statement of the Dow Chemical Company ("Dow") in connection with the annual meeting of stockholders to be held on May 7, 1969. On February 18, 1969, the Division of Corporation Finance advised the Medical Committee that Dow could omit the proposal from its proxy soliciting material. We believe that this decision was erroneous, and that the proposal is a proper one for shareholder action under Rule 14a-8 of the Commission's Proxy Rules. Accordingly, we request that the Commission review the decision of the Division of Corporation Finance and take the necessary steps to compel Dow to include the proposal in its forthcoming proxy soliciting material.

I. The Resolution

The Medical Committee's proposal would require the inclusion of the following resolution:

> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the state of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment

> to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

To meet some of Dow's objections to the above-quoted resolution, as set forth in Dow's letter of January 17, 1969 to the Medical Committee (see Section II, infra), the Medical Committee proposed an alternative resolution in a letter to Dow dated February 7, 1969. Dow has indicated that this latter resolution was not timely received. We believe that the arguments set forth in the body of this letter apply equally to the original resolution and to the alternative proposed by the Medical Committee, and we include the text of this alternative resolution below, should the Commission prefer to compel its inclusion rather than the inclusion of the original resolution.

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that the company shall not make napalm."

II. Background

On March 11, 1968, the Medical Committee, which owned five shares of the common stock of Dow, sent a letter to Dow requesting the inclusion of the first resolution quoted above in the proxy statement for the annual meeting of stockholders to be held on May 8, 1968. On March 21, 1968, Dow advised the Medical Committee that its letter had arrived too late for the proposal to be included in the proxy statement for that meeting, and it advised the Medical Committee that the request would be considered again in connection with the 1969 annual meeting. On January 6, 1969, having received no further communications

from Dow on this matter, the Medical Committee renewed its request to Dow that the resolution be included in the proxy statement for the 1969 annual meeting. On January 17, 1969, counsel for Dow advised the Medical Committee that it would omit the proposed resolution from its proxy statement, seemingly in reliance on Rules 14a-8(c)(2) and (5) of the Commission's Proxy Rules. On February 3, 1969, the Medical Committee wrote to Dow, replying to its comments on the first resolution and proposing the second resolution as an alternative. On February 18, 1969, as we have pointed out, the Division of Corporation Finance advised Dow and the Medical Committee that the first resolution could be omitted.

III. Rule 14a-8(c)(5)

-- Rule 14a-8(c)(5) permits management to omit a shareholder proposal

> "if the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

We contend that the Medical Committee's resolution cannot be excluded under the above-quoted paragraph. The resolution does not relate to the conduct of the ordinary business operations of the issuer. Rather, its subject matter is an amendment of the Certificate of Incorporation, a subject which, under Delaware law, can never be "a matter relating to the ordinary business operations of the issuer." Indeed, Delaware law specifically requires shareholder action before a corporation can amend its Certificate of Incorporation. Section 242(d)(1) of the Delaware Corporation Law provides:

> "Every amendment . . . shall be made and effected in the following manner -
>
> [The corporation's] directors shall adopt a resolution setting forth the amendment

> proposed, declaring its advisability, and either calling a special meeting of the stockholders . . . or directing that the amendment proposed be considered at the next annual meeting of the stockholders."

As the Commission is aware, on occasion, the Division of Corporation Finance has accepted the Medical Committee's argument on this point, albeit with respect to the amendment of bylaws rather than the Certificate of Incorporation. As the Division stated in a letter of January 19, 1961,

> "We are not prepared to conclude that a matter which the courts have held to be a proper subject for a shareholder's proposal to amend the bylaws is a matter relating to the conduct of the ordinary business operations of the issuer within the meaning of 14a-8(c)(5)."

Dow itself impliedly concedes that Delaware law permits a shareholder to initiate a proposal to amend the Certificate of Incorporation, since it does not contend that the proposal could be omitted under Rule 14a-8(c)(1) as not being a proper subject for action by security holders under state law.

IV. Rule 14a-8(c)(2)

Rule 14a-8(c)(2) permits management to omit a shareholder proposal

> "if it clearly appears that the proposal is submitted by the security holder . . . primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

In order to rely on this provision as a ground for excluding a shareholder proposal, management must demonstrate that the primary purpose of the proposal is to promote a "general . . . political cause"; it is not sufficient to demonstrate that one of the purposes of the resolution is political. It is our contention that the primary purpose of the Medical Committee's resolution is to assist Dow to improve the operations of its business. We believe that the adoption of the proposal will ultimately permit Dow to improve its admittedly troubled recruiting procedures, and to improve its public image. Dow itself recognizes that its ability to attract and retain "sensitive and creative employees" has been severely restricted by its continued manufacture of napalm, notwithstanding that napalm does not contribute materially to the income of Dow. See the article of February 10, 1969 from the New York Times attached to this letter.

It is clear from the history of Rule 14a-8(c)(2) that it was intended principally to prevent proxy statements from being used as a forum for referenda by stockholders on general political questions which bore no relationship to the business of the company. See Securities Exchange Act Release No. 3638, January 3, 1945. Indeed, the word "general" in the Rule must be read as modifying all the specific types of causes enumerated thereafter, i.e., general political causes. The Rule was not intended to prevent shareholders from having a voice in the policy of a company in areas which are properly the concern of shareholders but which also happen to be of a political or social nature.

The Medical Committee admits that its proposal has a political aspect, but it submits that the primary purpose of the proposal is not to promote a general political cause. We believe that to permit Dow to exclude the proposal would be contrary to the Commission's own Proxy Rules and to public policy. As former Chairman Cohen said in a recent speech,

> "The corporation as an institution is, in fact, invested with political powers . . . our democratic ideals require that political power be limited; that countervailing power be maintained; that power be responsive to the community's needs and aspirations; and that legitimate power be non-authoritarian . . . The exercise of political power (whether by Government or business) cannot be legitimate unless it is non-authoritarian - that is, unless it is subject to free and systematic analysis and criticism - what I have termed institutional criticism." (Original emphasis)

We agree with these statements, and we suggest that the Commission's Proxy Rules afford a mechanism whereby this institutional criticism can be exercised. As American corporations become increasingly political, it would be unfortunate indeed if stockholders were precluded from having a forum for expressing their views with respect to politically related corporate actions.

V. Conclusion

For the foregoing reasons, we submit that the resolution of the Medical Committee for Human Rights is a proper subject for shareholder action under the Commission's Proxy Rules and we request that the Commission take appropriate action to compel its inclusion in the proxy statement.

We would be pleased to present our views orally if the Commission believes such presentation would be helpful.

Sincerely,

ARNOLD & PORTER

By Jeffrey D. Bauman

cc: Mr. H. D. Doan, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Dr. Quentin D. Young

Enclosure

DOW RECRUITERS TRY A NEW TACTIC

Hope to Counter Protests on Campus Over Napalm

By JERRY M. FLINT

Special to The New York Times

DETROIT, Feb. 9—For recruiters of the Dow Chemical Company it's that time again—when they pack ham sandwiches in their briefcases.

The 1969 college recruiting season is starting and the sandwiches are no joke. Harvard holds the inter-collegiate record for imprisoning a Dow recruiter seven hours. But after one week and five campus visits in the new season the Dow men do not have a campus demonstration to their credit.

One was scheduled in Oregon last week but a snowstorm canceled the recruiting and the protest, Dow said. The protests have arisen because the company makes napalm, a flammable compound used in the Vietnam war.

Dow is now more concerned with rebuilding its campus image and has gone into what it calls "phase three" of its public relations effort to counter the napalm publicity. Its officials also believe demonstrators may be turning to "secondary targets" or other companies for future attacks.

"We've become one of the best known companies in America," said Ellis Brandt, the company's public relations director, as he explained Dow's strategy to fellow publicists last week.

Campus Figure Cited

"Ninety per cent of the campus population can tell you Dow makes napalm. Two years ago it was less than 1 per cent."

While the company insists it has lost neither business nor employes because of the demonstrations, Mr. Brandt said:

"What we are afraid of is that we may be losing the more sensitive and creative employes. Those are just the ones you want."

In phase three, Dow is trying to carry out a "business-student dialogue" in student newspaper advertisements. The company brought college newspaper editors to its Midland, Mich., headquarters in the fall for talks with Dow executives.

The company does not claim any converts but says it may be winning the respect of campus leaders.

Joel R. Kramer, who made the trip to Midland for The Harvard Crimson, wrote in his paper:

"What was most irritating about their collective stand was the unstated premise that anything you do is all right, provided you are willing to talk about it. It was a gap between people who enjoyed working for a profit, who accepted money flow as a measure of their success, and people like me who felt uncomfortable all day with the idea."

After a two-hour meeting with Dow's president "most of the editors remained confused as to the clarity of Dow Chemical's policies," wrote Stan Chess in The Cornell Daily Sun, adding that most editors "felt that the explanations for policy were primarily defensive and were rarely the reasons employed in the actual decision making."

Direct Debate Deplored

Dow does not want direct debates on the campus, Mr. Brandt said, because sometimes this allows the Dow man to become "trapped" into appearing to defend "the whole sorry mess of the war." He also noted two small recent demonstrations against other companies, Olin Mathieson and Litton Industries, as signs that the protestors may be moving "to secondary target companies."

Dow has counted 203 campus demonstrations against the company in the last three years plus several dozen more at plants, offices and foreign installations.

Phase one of Dow's public relations answer to the attacks was mainly an attempt to play down Dow's connection with napalm, Mr. Brandt said. The company put out a statement in the name of its president, Herbert Doan, saying Dow endorsed the right of protest but considered it "simple good citizenship" to supply the Government.

But phase one ended and phase two began in the fall, 1967, when the protests grew from picketing to "stopping what they called immoral acts," he said.

To answer the more violent protests, Dow began trying to "spot trouble in advance and going to meet it." This included trying to pick the campuses that would be the scene of violence, sending out a public relations advance man to talk to local news and college officials, leaving them a 12-page report on Dow's business plus reprints of articles with the military view on napalm and medical statements denying civilian casualties from the compound.

THE DOW CHEMICAL COMPANY

GENERAL OFFICE BUILDING
2030 ABBOTT ROAD CENTER
MIDLAND, MICHIGAN 48640

March 7, 1969

Securities and Exchange Commission
500 North Capitol Avenue
Washington, D.C. 20549

MAR 10 1969

Att'n: M. E. Jaffe, Esq.
Division of Corporation Finance

Re: File No. 1-3433
The Dow Chemical Company

Gentlemen:

According to the records of our transfer agent, The Cleveland Trust Company, the Medical Committee for Human Rights first became a stockholder of record of The Dow Chemical Company with the transfer to it of its five shares on March 22, 1968.

The Medical Committee's Dow Common Stock was registered in its name eleven days after the Medical Committee's original letter to Dow of March 11, 1968, presenting a proposed amendment to the Composite Certificate of Incorporation prohibiting the sale of napalm by the Company.

The timing of the 1968 letter in relation to the date of acquisition of these shares (acquired by gift, according to the March 11, 1968, letter) clearly negates the genuineness of the declaration of concern for Dow's public image set forth in the Medical Committee's letters in 1968 and 1969. The status of the Company as a supplier of napalm to the United States Department of Defense was well known prior to March, 1968, and the Medical Committee acquired the shares of Dow stock with full knowledge of Dow's public image in this respect.

The Medical Committee itself admitted that it submitted its 1968 proposal primarily for the purpose of "Promoting general economic, political, racial, religious, social or similar causes" [Rule 14a-8(c)(2)] when it said in its March 11, 1968, letter

> "Finally, we wish to note that our objections to the sale of this product is primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for

> our company's business as it is being used in the Vietnamese War."

Mr. Quentin D. Young's January 6, 1969, letter to Mr. W. A. Groening, clearly indicates that the Medical Committee's 1969 request is a continuation of the 1968 request, and adds as an additional reason for its request the

> "even more compelling feature of peace negotiations, which may well make termination of the use of our products against humans a reality, at least in Vietnam."

This additional reason is clearly for the purpose of promoting a general political, social or similar cause.

Please feel free to call upon Mr. Groening or me at any time if the Commission needs any additional information or cooperation from Dow to assist it in reaching a decision on this matter.

Very truly yours,

R. W. Barker

R. W. Barker
Assistant General Counsel

cc: Dr. Quentin D. Young
Member, Executive Committee
Medical Committee for Human Rights
1512 East 55th Street
Chicago, Illinois 60615

MAR 14 1969

Jeffrey Bauman, Esquire
Arnold & Porter
1229 19th Street
Washington, D.C.

Re: The Dow Chemical Company
File No. 1-3433

Dear Mr. Bauman:

Enclosed is a copy of our February 18, 1969 letter to Dow Chemical Company.

Sincerely yours,

William E. Toomey
Assistant Chief Counsel
Division of Corporation Finance

Enclosure

THURMAN ARNOLD
PAUL A. PORTER
MILTON V. FREEMAN
NORMAN DIAMOND
WILLIAM L. McGOVERN
CAROLYN E. AGGER
LOUIS EISENSTEIN (1915-1966)
C. DUANE VIETH
VICTOR H. KRAMER
REED MILLER
ABE KRASH
WILLIAM D. ROGERS
HOWELL HILL
JULIUS M. GREISMAN
EDGAR N. BRENNER
DENNIS G. LYONS
STUART J. LAND
ROBERT E. HERZSTEIN
JAMES R. McALEE
WALTER J. ROCKLER
WERNER KRONSTEIN
PAUL S. BERGER
JOHN T. RIGBY
JAMES F. FITZPATRICK
KELVIN C. GARDOW
BRUCE L. MONTGOMERY
JOHN D. HAWKE, JR.
MURRAY H. BRING

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RICHARD S. EWING
RICHARD L. BACON
HARRY HUGE
CHARLES R. HALPERN
BROOKSLEY LANDAU
DAVID R. KENTOFF
DAVID H. LLOYD
JACK L. LIPSON
ARMISTEAD W. GILLIAM, JR.
PETER K. BLEAKLEY
ALEXANDER C. BENNETT
JEROME I. CHAPMAN
MICHAEL SCHNEIDERMAN
DANIEL P. LEVITT
REID P. CHAMBERS
RICHARD J. WERTHEIMER
JEFFREY D. BAUMAN
STEPHEN L. NESTER
ANDREW S. KRULWICH
IRVIN B. NATHAN
NANCY K. MINTZ
NORTON F. TENNILLE, JR.
ROBERT D. ROSENBAUM

March 17, 1969

CABLE ADDRESS
"ARFOPO"

Securities and Exchange Commission
500 North Capitol Street, N. W.
Washington, D. C. 20549

Attention: Courtney Whitney, Jr., Esq.
Chief Counsel, Division of
Corporation Finance

Gentlemen:

Enclosed is a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER

By Jeffrey D. Bauman
S/ Jeffrey D. Bauman

Enclosure

[37a]

ARNOLD & PORTER
1229 NINETEENTH STREET, N. W.
WASHINGTON, D. C. 20036
223-3200

HERMAN ARNOLD
PAUL A. PORTER
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NORMAN DIAMOND
WILLIAM L. McGOVERN
CAROLYN E. AGGER
LOUIS EISENSTEIN (1913-1966)
DUANE VIETH
VICTOR N. KRAMER
LEO MILLER
JOE KRASH
WILLIAM D. ROGERS
HOWELL HILL
JULIUS M. GREISMAN
EDGAR N. BRENNER
DENNIS G. LYONS
STUART J. LAND
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JAMES R. McALEER
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BRUCE L. MONTGOMERY
JOHN D. NAWAZ, JR.
MURRAY M. BRING

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ROBERT D. ROSENBAUM

CABLE ADDRESS
"ARFOPO"

March 17, 1969

Securities and Exchange Commission
500 North Capitol Street, N. W.
Washington, D. C. 20549

Gentlemen:

On March 7, 1969, the management of Dow Chemical Company submitted a letter to the Division of Corporat Finance, apparently in response to our letter to the Commission in this matter dated February 28, 1969. We believe that Dow's submission misconceives the issues presented for the Commission's decision.

In confining its response to making various allegations about the subjective motives of the shareholder in proposing the resolution for consideration at the annual meeting, Dow management does not meet the arguments made on page 5 of our letter of February 28, 1969. As we pointed out, a proposal cannot be excluded under Rule 14a-8(c)(2) at all unless it concerns a "general economic, political . . . cause." All corporate actions, of course, have economic, political, or social aspects and consequences. The phrase "general cause" in the Rule is necessarily a limiting term, and a term of art. Which shareholder proposals concern such general causes, and which do not, is determined by an objective test, as the background and history of the Rule make clear. That test, simply

stated, is whether the proposal has to do with the direct business concerns of the shareholders as shareholders, that is, with matters over which the Corporation has control.

There can be no question that the shareholder proposal in question here meets this objective test. Unlike the proposed resolution "the antitrust laws and the enforcement thereof [should] be revised" - one of the examples of propositions "of a similar nature" in Securities Exchange Act Release No. 3638 which flesh out the term "general political [etc.] cause" in Rule 14a-8(c)(2) - this proposal has to do with the most direct concern of all shareholders, the prospects for maximum profitability of the company in comparison with its competitors. The Company's management has declared to the shareholders:

> "[W]e as a company have made a moral judgment on the long-range goals of our government and we support these. . . . From a long range viewpoint we could be hurt in many ways." (Statement by Dow President H. D. Doan, The Dow Diamond No. 4, 1967, attached as Annex A.) [Emphasis added]

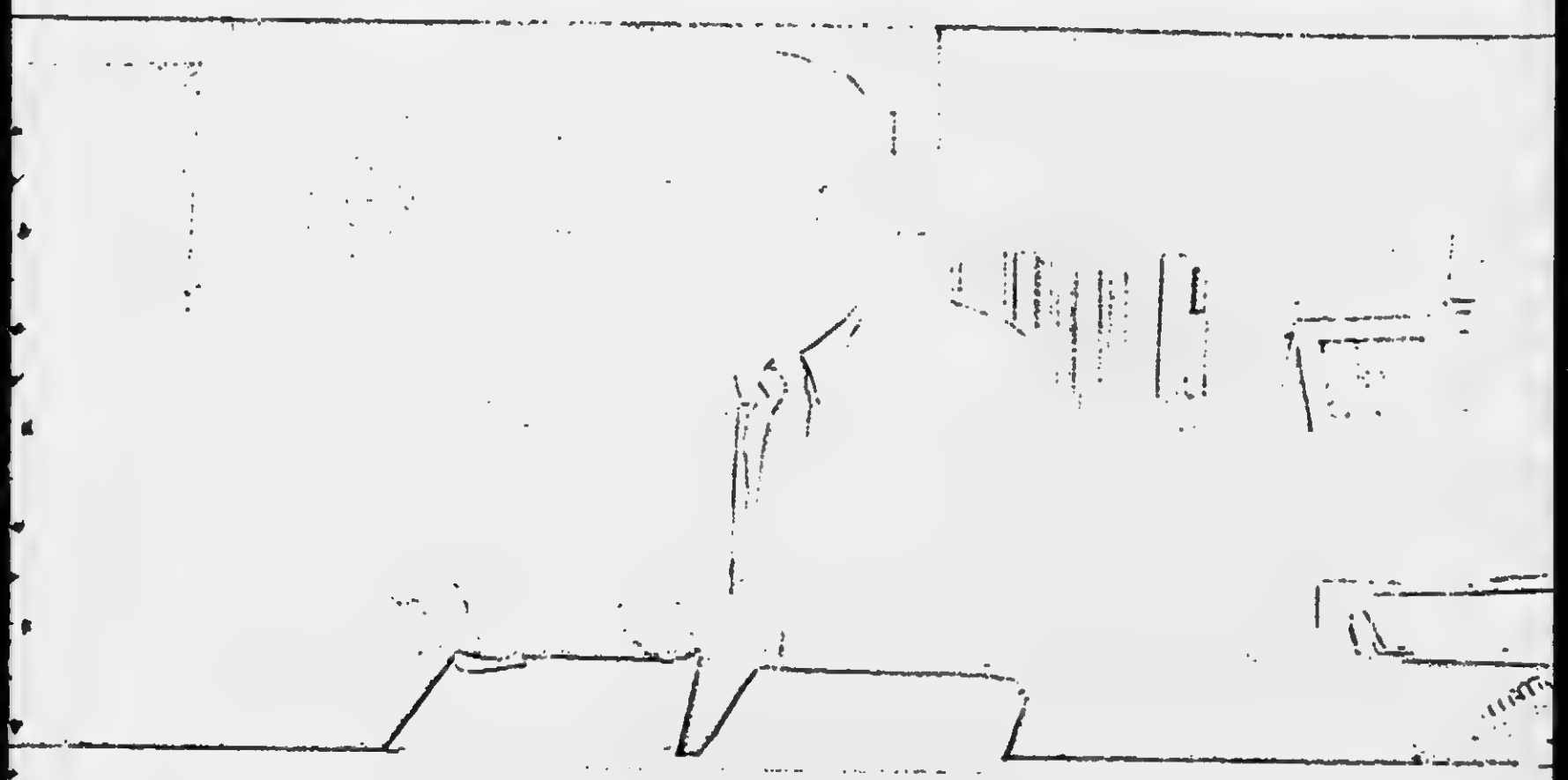
Shareholder consideration of the advisability urging the preparation of an amendment to the Company's Certificate of Incorporation, to protect the Corporation from such economic harm incurred by reason of a moral judgment, is clearly proper. An amendment to its own certificate, defining the scope of its business operations, is clearly a matter over which the Corporation has control. Since the proposed resolution meets the initial test - that it not concern merely a general political, social or economic cause - it falls outside the exception defined in Rule 14a-8(c)(2), regardless of whether its subjective motivation, like that of Company management, is also moral.

Sincerely,

ARNOLD & PORTER

By _____
Jeffrey D. Bauman

cc: Mr. H.D. Doan, President, [39a]
Dow Chemical Company
Mr. H.H. Dow, Secretary, Dow Chemical Company
Dr. Quentin D. Young



by H. D. DOAN
President
The Dow Chemical Company

In response to many inquiries concerning the production of napalm, new President H. D. Doan in this statement has outlined the company's position.

A LETTER WRITER complained to a Chicago newspaper recently that The Dow Chemical Company was getting a million dollars worth of free publicity from anti-war protests on college campuses.

This kind of publicity we don't need, for it fixes us in the public mind only as the company that makes napalm. There's a real risk, in fact, in the article which follows for it adds more mileage to what has already been a grossly overexposed subject. But the risk is worth it if we can clear up a few of the issues in the controversy which seems to swirl about our company.

Dow does make napalm under contract for the U. S. government and has done so for about three years. We did not develop the product. Napalm was first developed in 1942 and has been used in warfare by many nations since that time. Dow was asked to bid on a contract for its production in 1965 when the Air Force developed a new formulation incorporating polystyrene as a principal ingredient. Dow is a leading producer of polystyrene, a plastic raw material. There have been other producers of napalm but Dow at present is the only producer.

The contract has little economic significance to Dow. It amounted to less than one half of one per cent of total sales last year—in the range of $5 million—and an even smaller percentage of total profits. This year it will be in the range of one-fourth of one per cent and again a smaller percentage in profits. We are not a major

defense contractor. All of our business to all branches of government comes to less than five per cent of sales.

Why do we produce napalm? In simplest terms, we produce it because we feel that our company should produce those items which our fighting men need in time of war when we have the ability to do so.

A quarter of a century ago this answer would have satisfied just about anyone who asked this question. Today, however, it doesn't. Today we find ourselves accused of being immoral because we produce this product for use in what some people consider an unjust war. We're told that to make a weapon because you're asked to do so by your government puts you in precisely the same position as the German industrialists who pleaded at the Nuremberg Trials that they were "only following orders."

And these are just a few of the milder charges in a barrage of protest that has included picketing of some of our plants and sales offices, boycotts against our products, thousands of letters of protest to the company and to individuals within the company, and, most publicized of all, organized demonstrations on campuses across the nation which have ranged from peaceful protest to violence and physical obstruction of Dow job interviews.

The central issue, of course, is the war in Vietnam. This is not a popular war. No one likes war, least of all the men who have the dirty and dangerous and heartbreaking job of having to fight it. All of the debate in the world about how we got there or how we get out is proper and right in its place but it doesn't change the fact that we are there nor the fact that our men are there and need weapons to defend themselves.

When Dow first began to face this protest movement, more than a year ago, our board of directors took another look at its original decision to make this product for our government. We discussed at great length among ourselves the very serious charges and protests against us and finally resolved that there could be no other choice but to continue making this product.

In recent weeks, since the increased publicity about campus protests against Dow, we've begun to hear from the men in Vietnam in letters that confirm our reason for this decision. A Congressional Medal of Honor winner has written, for instance, "War and killing is not at all pleasing to anyone. The infantry in Viet Nam fights to win and *stay alive*. We need and are thankful for napalm."

An army enlisted man writes: "The war would not end if companies such as yours suddenly refused to manufacture napalm and other military supplies."

An infantry captain: "Your napalm has saved the lives of countless American soldiers."

Fourteen GIs signed a letter including this comment: "The effectiveness of napalm in saving U.S. lives is overwhelming."

And a Marine Corps lieutenant: "War is never a pleasant form of existence, but we believe we are here to further the cause of peace, and stem the tide of communism. Napalm is just one of the instruments which we must use to support ourselves."

Protesters argue, however, that napalm is an immoral product in and of itself and that it is used indiscriminately against civilians in Vietnam. Many protest leaders will readily admit, in fact, that Dow has become a focal point for protest because of the emotions that can be aroused by napalm.

Secretary of Defense Robert S. McNamara has said of these charges in a recent letter to Dow, "The implication that napalm is used indiscriminately in Vietnam is not true. General Earle G. Wheeler, Chairman of the Joint Chiefs of Staff, has said publicly that napalm is a military necessity. It answers a specific military need in certain combat situations peculiar to the type of warfare practiced by the Viet Cong.

"General Wheeler has also pointed out that the precautions we take against injury by this weapon to noncombatants are as painstaking as we can make them without hamstringing our military operations," Secretary McNamara continued. "By contrast, the Viet Cong has repeatedly carried on terror and murder campaigns directed against innocent civilians."

Other sources, including combat veterans of Vietnam in their letters to us and in conversations with our people, add further confirmation to what General Wheeler has said.

But what of the argument that we are no different from the German industrialists who "just followed orders"?

We reject this argument on several points. First we reject the validity of comparing our present form of government with Hitler's Nazi Germany. In our mind our government is still representative of and responsive to the will of the people.

Further, we as a company have made a moral judgment on the long-range goals of our government and we support these. We may not agree as individuals with every decision of every military or governmental leader but we regard these leaders as men trying honestly and relentlessly to find the best possible solutions to very, very complex international problems. As long as we so regard them, we would find it impossible not to support them. This is not saying as the critics imply that we will follow blindly and without fail no matter where our government leads us. While I think it highly improbable under our form of government, should despotic leaders attempt to lead our nation away from its historic national purposes, we would cease to support the government. But I can foresee this happening only if through resort to anarchy we prevent the functioning of democratic processes.

Our critics ask if we are willing to stand judgment for our choice to support our government if history should prove this wrong. Our answer is yes.

On the related issue of campus recruiting we feel that we have the right and the responsibility to meet on campus with students who want to discuss job opportunities with our company representatives. This is no sinister activity but rather a routine function, provided at most colleges for the mutual benefit of students and business, which allows large and small businesses an equal chance to make themselves available to interested students.

When college officials request us to postpone or cancel recruiting visits, of course, we do so. We have found, however, that college officials in general have been extremely helpful and cooperative despite the problems which have arisen on various campuses.

Has Dow been hurt by the various kinds of protests? This is difficult to answer without qualification. We can detect no effect on our sales, for example. And early in the recruiting season our number of interviews was up sharply. These are still running ahead of a year ago. We can detect no decline in the quality of students with whom we conduct interviews. And while we have had some stockholders sell their Dow stock in protest to our stand on this issue, we can't really gauge the effect in this area.

Yet in the minds of some people we are becoming the company that produces napalm rather than a highly diversified company producing more than 800 products basic to all other industries and ranging from measles vaccine to brake fluids and antifreezes. There may be outstanding businessmen or scientists of the future who have been lost to Dow because of deep personal feelings on this matter or simply because somehow they were deprived of the chance to talk to our representative. From a long-range

viewpoint we could be hurt in many ways.

We point this out not in a plea for sympathy but as a simple fact. Certainly no problem we face now and in the future can compare to those faced by the men who are fighting this war and by their families.

But there may also be in this situation both for Dow and for business in general some very real opportunities. One of these may be a start toward more meaningful dialogue between business and the campus and other groups who have joined in this protest.

Basically the debate over Vietnam, as long as it remains peaceful and honest debate, is a healthy thing. And many of the questions being asked are pertinent questions which business must ask itself. Business should and must be willing to discuss some of these questions with the campus and intellectual community which has raised them—discuss them not in the emotional atmosphere of demonstrations and confrontations but under conditions which will allow a true dialogue. The issue of business making moral judgments, the issue of duty to country deserve thoughtful discussion. This is not to say that business can or should debate specific U. S. foreign policy decisions.

Equally important, however, is the challenge to Dow and to the business world to focus attention and action on an issue far more vital than Vietnam. That issue is peace itself, the lasting peace that man has sought throughout history. Such a lasting peace can be achieved only when we find solutions to such basic world problems as hunger and disease and lack of economic opportunity.

We need to change wild jungles to productive croplands, to increase crop yields and find better ways to process and preserve the crops that are abundant, to increase meat production efficiency, to improve our recovery of natural mineral or petroleum resources, to bring industry to undeveloped lands and thus provide an economic base for sound growth, to help clean up and protect valuable water resources threatened by pollution, to bring the rest of the world's standard of living closer to our own.

These are things that Dow is working on right now—things on which we spend far more time and money and effort than we spend on the production of napalm. We intend to continue making napalm because we feel that so long as the United States is sending men to war it is unthinkable that we would not supply the materials they need. But we also intend to continue to direct our talents and efforts toward that better tomorrow for all mankind that can build lasting peace.

This we feel is the real challenge of business that calls for the kind of dedication and zeal and concern for mankind that is being manifested in much of this campus protest. We firmly believe that the young men and women truly concerned about doing something to build a better world rather than just talking about it are in the vast majority. We intend to make every effort to convince them that the business world offers one of the best opportunities to do that job effectively. ◆

—WHY DOW RECRUITS ON COLLEGE CAMPUS

The target of most anti-war protests against Dow has been the recruiting representative sent to a college to interview students interested in talking about a job with the Company.

The Dow recruiting staff consists of 15 full-time men plus 250 technical and professional employees who take about a week from their regular jobs to interview students on campus.

This school year the recruiting staff will visit 330 colleges and universities and conduct more than 11,000 interviews.

This extensive and highly organized activity is an indication of the highly competitive nature of acquiring college trained talent, an almost complete reversal of the traditional hiring practices of 20 or more years ago.

Prior to the end of World War II, most graduating students would write to companies in which they were interested. Few firms bothered to send a representative to campuses or actively solicited interviews.

In recent years demand for college graduates, particularly in the technical disciplines, has soared. At the same time, the number of B.S.-level graduates available for employment in industry has dwindled; larger proportions are going on to higher degrees or going into teaching or government jobs.

For example, in a recent year there were less than 4,000 chemical engineers graduating at the B.S. and M.S. levels in the U. S. Of these, less than 2,400 were available for employment because of graduate school, military commitment and other reasons.

One result of this trend: at one Big Ten school last year, more than 2,000 employers sent representatives to the campus and conducted 18,000 interviews.

Another result has been the growing need for the professional college placement officer. The placement officer helps faculty members by relieving them of the extra curricular chore many of them had acquired of serving as a contact between students and employers. He helps students by setting up a central, convenient location for scheduling and conducting interviews. He helps employers by setting up schedules, providing a mutually convenient location and screening out obviously unqualified candidates (e.g., sophomores and juniors).

In the process, the placement officer also performs a valuable guidance and career counseling service which has undoubtedly helped many youngsters to avoid costly career mistakes. The placement officer has also been able to raise and enforce ethical standards of interviewing and hiring on the part of employers.

Because of the professional nature of the college placement function and the important role it plays in maintaining high standards in the recruiting process, Dow's Corporate Recruiting Department is firmly committed to supporting placement officers and to conducting its college interviews through the official campus placement centers. ◆

Reprinted from The Dow Diamond Number 4, 1967

Printed in U.S.A.

APR 2 1969

Jeffrey D. Bauman, Esq.
Messrs. Arnold & Porter
1229 Nineteenth Street, N. W.
Washington, D. C. 20036

Re: The Dow Chemical Company
File No. 1-3433

Dear Mr. Bauman:

This is with respect to the inclusion in the proxy statement of The Dow Chemical Company for the 1969 annual meeting of shareholders of a proposal concerning an amendment to the Company's Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings which was submitted by the Medical Committee for Human Rights in a letter to Dow Chemical Company dated January 6, 1969 and the alternative proposal requesting that the Board of Directors of the Company consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation that the Company shall not make napalm which was submitted by the Medical Committee for Human Rights to Dow Chemical Company on February 7, 1969.

The Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omits the proposals from its proxy statement for the forthcoming meeting of shareholders.

Very truly yours,

CWW

Courtney Whitney, Jr.
Chief Counsel
Division of Corporation Finance

APR 2 1969

W. A. Groening, Jr., Esq.
General Counsel
The Dow Chemical Company
2030 Abbott Road Center
Midland, Michigan 48640

Re: File No. 1-3433

Dear Mr. Groening:

This is with respect to the inclusion in the proxy statement of The Dow Chemical Company for the 1969 annual meeting of shareholders of a proposal concerning an amendment to the Company's Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that this substance will not be used on or against human beings which was submitted by the Medical Committee for Human Rights in a letter to the Company dated January 6, 1969 and the alternative proposal requesting that the Board of Directors of the Company consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation that the Company shall not make napalm which was submitted by the Medical Committee for Human Rights on February 7, 1969.

The Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the subject proposals are omitted from the Company's proxy statement for the forthcoming annual meeting of shareholders.

Very truly yours,

FILED
APR 2 - 1969

cwp

Courtney Whitney, Jr.
Chief Counsel
Division of Corporation Finance

March 24, 1969
10:00 A. M.

Re: Dow Chemical Company
(File 1-3433)

Reference was made to proxy material filed pursuant to Regulation 14 of the Rules and Regulations under the Securities Exchange Act of 1934 by Dow Chemical Company (File 1-3433) for use in connection with its annual meeting of stockholders scheduled for May 7, 1969.

Upon the recommendation of the Division of Corporation Finance contained in two memoranda dated March 18, 1969, the Commission determined to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights. The Commission also denied the request of counsel for the Committee to be heard by the Commission in the matter.

Orval L. DuBois
Secretary

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF
THE SECURITIES AND EXCHANGE COMMISSION

BRIEF FOR PETITIONER

Roberts B. Owen
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorney for Medical Committee
on Human Rights, Petitioner

Of Counsel:

Edwin M. Zimmerman
Richard B. Herzog
Paul S. Hoff
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

November 12, 1969

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* Cases or authorities chiefly relied upon are marked by asterisks.

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STATEMENT OF ISSUES

Where the Securities Exchange Act of 1934 has authorized the Securities and Exchange Commission to promulgate Proxy Rules "in the public interest" to insure that corporate shareholders shall have the right to vote by proxy on all matters of corporate policy relating directly to the affairs, and within the control, of the corporation, and where the management of a corporation has addressed itself to such a policy matter (involving the manufacture of a controversial product) and made a "moral" decision to manufacture the product in accordance with management's conception of corporate citizenship, was it not error for the SEC below to hold as a matter of law (1) that the issue was too "general" and unrelated to the company's business to be a proper subject for a shareholder vote and (2) that the matter was an "ordinary business" question to be decided by management without shareholder participation?

RULE 8(d) STATEMENT

This case has been before this Court before, under the same name and number as herein (Medical Committee for Human Rights, Petitioner v. Securities and Exchange Commission, Respondent, No. 23,105), on a motion of the respondent Commission to dismiss this petition for review. The motion was decided (per Tamm, Leventhal and McGowan, JJ.) on October 13, 1969.

REFERENCES TO RULINGS

The ruling of the Securities and Exchange Commission below was announced on April 2, 1969, and appears in the record at pages R. 44a and 45a. That ruling was based upon certain legal conclusions which were presented to the SEC in a letter from counsel for Dow Chemical Company dated January 17, 1969 (R. 9a). (The legal conclusions therein asserted were first adopted by the SEC's Division of Corporation Finance on February 18, 1969 (R. 20a), and on March 24, 1969, the Commission indicated its agreement with the same legal conclusions (R. 46a).)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

This case concerns the right of a shareholder of a major American company to utilize the corporate proxy machinery to obtain an expression of the views of the shareholders generally as to a "moral" decision made by corporate management, as a matter of "conscience", with respect to the use of the corporate assets. In the proceedings below the

the SEC ruled that as a matter of law the shareholder had no right to utilize the corporate proxy machinery for this purpose, and the shareholder now appeals to this Court for relief.

1. The Corporate Decision

Dow Chemical Company manufactures a chemical product known as "napalm" which is sold exclusively to the United States Department of Defense. It is common knowledge that many American citizens are deeply concerned about the destructive use of napalm, and there has been a considerable degree of public protest against Dow's napalm production. Although efforts have been made to persuade the company to terminate or not renew its napalm contract with the Government (a contract which is not financially rewarding[1/]), Dow's management has made the "moral" decision to continue to produce the product out of a sense of patriotism. According to Dow's President, "We as a company have made

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1/ Dow's President stated in 1967,

> "[T]he contract has little economic significance to Dow. It amounted to less than one-half of one percent of total sales last year -- in the range of $5,000,000 -- and an even smaller percentage of total profits. This year it will be in the range of one-fourth of one percent and again a smaller percentage in profits." (R. 40a).

a moral judgment on the long-range goals of our government and we support these." (R. 42a) (emphasis supplied). The management's decision, then, has been made on the basis of "conscience":

> "We, as individuals, are personally concerned with the world and its problems. We have sons and daughters in the armed forces, in the Peace Corps, and in the universities. A corporation is a collection of individuals, and the use of our consciences is, as it should be, a part of the decision-making process." 1/

Although the company recognizes that its manufacture of napalm may well adversely affect its ability to hire able personnel and remain "competitive," 2/ the company has nonetheless adhered to its decision to make napalm on the basis of its "moral judgment" and as a matter of "conscience."

1/ Address of Dow's President at Dow's May 1967 annual meeting, quoted in Lawrence J. Lasser, Dow Chemical Company, 20 (Harvard Business School case study, 1968) (emphasis supplied). Dow's Chairman of the Board has also asserted this position. At the May 1969 annual meeting he said, in answer to persons who criticized during the question and answer period the company's production of napalm: "Last year you said Dow should make a moral decision. We've made one." Dow Chemical Company, Shareholders Quarterly, 2 (July 1969).

2/ The following corporate statement appears in the record:

> "There may be outstanding businessmen or scientists of the future who have been lost to Dow because of deep personal feelings on this matter . . .. From a long-range viewpoint we could be hurt in many ways." (R. 42a).

2. Petitioner's Request for an Opportunity to be Heard with Respect to the Corporate Decision Involved

The Medical Committee for Human Rights (hereinafter the "Medical Committee") is a shareholder of record of Dow Chemical Company. In March of 1968 the Medical Committee invoked Rule 14a-8(a) of the Proxy Rules of the Securities & Exchange Commission, 17 C.F.R. § 240.14a-8, which provides, in part, as follows:

> "(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement . . . ." (Emphasis supplied).

Relying upon the foregoing rule the Medical Committee requested Dow's management to include, in the proxy statement which was going to be distributed to all Dow shareholders in advance of the annual 1968 meeting, a proposed resolution calling for an amendment of Dow's certificate of incorporation so as to limit the company's sales of napalm.[1/] If Dow's

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1/ The Medical Committee's proposed resolution read as follows:

> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings." (R. 2a).

management had acceded to this request, the resolution and a brief statement of the Medical Committee's reasons for urging its adoption would have been set out in the corporate proxy materials and mailed to Dow's approximately 90,000 shareholders in advance of the meeting. All shareholders would then have had an opportunity to consider the issue before giving their proxies to management or appearing in person at the annual meeting.

Dow's management, however, rejected the Medical Committee's request. The management stated that the corporate proxy statement had "already been printed" and that the Medical Committee's request therefore had simply been received too late (R. 4a). In response to the Medical Committee's request that the matter be considered for inclusion in the company's proxy materials for the next annual meeting (in 1969), Dow responded that "we will study the matter and will communicate with you later this year [in 1968]." (R. 4a).

In fact, however, Dow never did communicate with the Medical Committee again in 1968. Accordingly, on January 6, 1969, the Medical Committee resubmitted its 1968 proposal (R. 8a), and on February 3, 1969, it submitted a revision which read as follows:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that the company shall not make napalm." (R. 16a).

Here again, of course, the Medical Committee was seeking to pose the issue for its fellow shareholders in advance of their decision as to how to vote their proxies and how to vote at the annual meeting.

Again, however, Dow's management rejected the Medical Committee's request. In so doing Dow relied upon two exceptions to the general requirement that all shareholder proposals be included in management's proxy materials.

(a) The first cited exception was Rule 14a-8(c)(2) which provides that a shareholder proposal may be omitted from the proxy statement

> " . . . if it clearly appears that the proposal is submitted by the security holder primarily for the purpose . . . of promoting general economic, political, racial, religious, social or similar causes."

The legal opinion submitted to the SEC by Dow in explanation of its position recited that Dow "has been the target of protests and demonstrations for the past few years" and that such protests and demonstrations "are a reflection

of opposition on the part of certain segments of the population against the policy of the United States Government in waging the war in Vietnam." Observing that Dow "appears to have been singled out symbolically by the [war] protesters", Dow's counsel reached the legal conclusion that "under all of these circumstances . . . it clearly appears that the proposal is primarily for the purpose of promoting a general political, social, or similar cause." (R. 10a).

(b) In his opinion Dow's counsel also relied upon a second exception to the general rule requiring inclusion of shareholder proposals in corporate proxy statements: Rule 14a-8(c)(5) authorizes omission of a shareholder proposal if it "consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations" of the company. Counsel's reasoning was that:

> "[T]he determination of the products which the Company shall manufacture, the customers to which it shall sell the products, and the conditions under which it shall make such sales are related to the conduct of the ordinary business operations of the Company and . . . any attempt to amend the Certificate of Incorporation [with respect to such matters would be] contrary to the concept of corporate management which is inherent in the Delaware General Corporation Act under which the Company is organized." (R. 9a).

3. The Proceedings Below

The SEC has established what it describes as certain "formal procedures"[1] under which, if a controversy arises between a shareholder and management with respect to the inclusion of a shareholder proposal in the corporation's proxy materials, the controversy must be brought before the SEC in advance of the preparation of the corporate proxy materials so that the Commission will have an opportunity "to consider the problems involved in such cases" before management takes a final position.[2] The steps contemplated by these "formal procedures" (each of which was taken in this case) are as follows:[3]

(a) The security holder must transmit its proposal (for inclusion in the corporation's proxy materials) to the management. Here the Medical Committee made its submission to Dow early in 1969 (R. 7a, 15a).

(b) The management, if it wishes to exclude the shareholder proposal, must submit to the SEC the proposal

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1/ 17 C.F.R. § 202.1(a), (b), and (c).

2/ 19 Fed. Reg. 246 (January 14, 1954).

3/ The procedures are found at 17 C.F.R. § 240.14a-8(a) and (d).

and supporting papers "as received from the security holder", together with the opposing views of management and an opinion of counsel. Dow complied with this requirement.

(c) The required papers must be filed with the Commission not later than 20 days prior to the date on which preliminary copies of the proxy materials are filed with the Commission "so that the Commission will have . . . time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position . . . ."[1/] Dow complied with this requirement.

(d) Management must notify the security holder of its action and serve the security holder with copies of the materials filed with the Commission. Dow complied with this requirement (R. 11a, 18a).

(e) In such a proceeding "the burden of proof" is "upon the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material."[2/]

1/ Sec. Ex. Act. Rel. No. 4979, 19 Fed. Reg. 246 (January 14, 1954

2/ Id.

(f) The SEC staff and, in appropriate cases, the Commission itself, reviews the issues as presented by the parties and makes a decision as to whether the particular shareholder proposal should or should not be included in the company's proxy materials.[1/]

When Dow and the Medical Committee followed the foregoing mandatory "formal procedures" and submitted their dispute to the SEC, the issue between them was a pure issue of law -- the proper legal interpretation of the Proxy Rules (i.e., Rule 14a-8(c)(2) and (5)) upon which Dow relied in arguing for the propriety of excluding the Medical Committee's proposal. While the matter was before the agency both parties briefed that legal issue, presenting conflicting legal arguments,[2/] and on February 18, 1969, the SEC's Division of Corporation Finance made an initial ruling on the question. It informed Dow that "for reasons stated in your letter and

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1/ Where the SEC concludes in such a proceeding that management cannot properly exclude the shareholder proposal, the Commission can take any one of three alternative steps: (1) it can commence an administrative proceeding looking toward a declaratory order to the effect that exclusion of the proposal would violate the Commission's Proxy Rules, 5 U.S.C. § 554(a) and (e); (2) it can initiate an administrative proceeding looking toward the suspension of the registration of the company's securities for failure to comply with the provisions of 15 U.S.C. § 78s(a)(2); or (3) it can initiate a lawsuit in a federal district court seeking an injunction to compel the company to include the shareholder proposal in the proxy materials, 15 U.S.C. § 78u(e).

2/ See R. 9a, 19a, 26a, 34a, 38a.

the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy materials for the company's annual meeting pursuant to Rules 14a-8(c)(2) and 14a-8(c)(5) under the Securities Exchange Act of 1934" (R. 20a).

Thereafter, the legal issues framed by the parties were considered by the Commission itself. On March 18, 1969, the recommendation of the Division of Corporation Finanace apparently went forward to the full Commission (R. 46a), and on April 2, 1969, the parties were notified of the Commission's decision:

> "The Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the . . . [company omits the Medical Committee's] proposals [from its] proxy statement for the forthcoming meeting of shareholders." (R. 44a-45a).

The minute of the Commission's action expressly states that the Commission's decision was based "upon the recommendation of the Division of Corporation Finance" (R. 46a), and, as noted above, the latter recommendation was explicitly based on the legal arguments submitted by Dow's counsel. Since no factual questions were presented to the SEC at any time during the controversy, it is quite clear that in taking its action the Commission had decided that Dow's legal interpretation

of the Proxy Rules was correct and that the interpretation urged by the Medical Committee was wrong as a matter of law.

4. The Jurisdiction of this Court

The Medical Committee seeks review of the action of the Commission below under § 25(a) of the Securities Exchange Act, 15 U.S.C. § 78y(a), which provides in relevant part as follows:

> "Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in . . . the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the entry of such order, a written petition [for review]."

The Medical Committee's petition for review was filed in this Court on May 29, 1969, within 60 days after receiving notice of the Commission's action below. On July 10, 1969, counsel for the Commission filed a motion to dismiss the petition, arguing in effect that when Dow and the Medical Committee had followed the "formal procedures" established by the Proxy Rules for bringing disputes of this kind before the Commission, the parties had not been engaged "in a proceeding" of any kind; that the Medical Committee, although involved in a direct adversary contest with Dow before the

Commission, had not been "a party" to a proceeding; that the Commission's final decision in favor of Dow and against the Medical Committee did not constitute a reviewable "order"; and that the Medical Committee had not been "aggrieved" by the Commission's action. The Medical Committee, of course, opposed the Commission's motion, arguing that there had been "a proceeding" to which the Medical Committee was a "party"; that the Commission's final administrative resolution of the legal controversy between Dow and the Medical Committee constituted an "order" by which the Medical Committee had been "aggrieved"; and that the above-cited statute squarely conferred jurisdiction upon the Court to review the legal determination of the Commission below. This jurisdictional issue was fully briefed by the Commission and by the Medical Committee; the Court (per Tamm, Leventhal, and McGowan, JJ) heard oral argument on the issue; and on October 13, 1969, the Court entered an order denying the Commission's motion to dismiss "without prejudice to renewal thereof in the briefs and at the argument on the merits". The order indicates that Judges Leventhal and McGowan voted to deny the motion on the stated terms and that Judge Tamm voted to grant the motion.

SUMMARY OF ARGUMENT

The issues presented on the merits on this appeal are the proper interpretation of subdivisions (2) and (5) of SEC Proxy Rule 14a-8(c), and whether the Commission's ruling below was within its authority under Section 14(a) of the Securities Exchange Act of 1934. The first cited subdivision of the Rule allows management to exclude from its proxy materials shareholder proposals on "general" political and social matters, and the second subdivision precludes such shareholder proposals on specific problems of the "ordinary business operations" of the company. By adopting the legal views of Dow's counsel below, the SEC has held that both of the foregoing rules precluded Dow's shareholders from voting on the Medical Committee's proposal.

Although deference would ordinarily be due to the SEC's own administrative interpretation of its regulations, such deference is not warranted here for a number of reasons. Preliminarily, the SEC's ruling below is irrational on its face because it holds that the Medical Committee's proposal is too "general" and policy-oriented to be considered by the stockholders and, in the same breath, that it is too specific with respect to the ordinary business details of the company's operations.

More importantly, the ruling in the present case must fall because it is totally inconsistent with the "public interest" requirement of Section 14(a) of the Securities Exchange Act as delineated by the rulings of the Commission itself over a period of years. In the period 1934-1952 the Commission authoritatively ruled that the "public interest" required that shareholders be afforded every opportunity to vote on shareholder proposals and that management could exclude such a proposal from its proxy materials only upon a clear showing that it related to a matter which was not a proper subject for shareholder action. Specifically, the Commission made clear that management must include in its proxy materials any shareholder proposal on an issue relating directly to the affairs of the corporation and within its control and that management must include any such proposal on any matter which was proper for shareholder action under state law.

In the instant case, the issue raised by the Medical Committee qualified for shareholder consideration on both grounds: it deals with a problem which directly relates to the company's affairs and is within the company's control, and it is a matter on which shareholders are affirmatively encouraged to vote under the relevant state law. Accordingly, the ruling of the Commission here is contrary to

the "public interest" requirement of the Securities Exchange Act, as interpreted by the Commission itself, and is thus beyond the statutory authority of the Commission. In this respect it is another example of the development, in recent years, of a tendency of the SEC, in matters involving shareholder proxy proposals, to indulge in "inconsistent administration, poor substantive law, and a failure fully to inform outsiders of its informal decisions."1/

Finally, the ruling in this case represents an ironic suppression of the role which the Congress and the Commission itself have deemed appropriate for shareholders in the corporate decision-making process. Both the Congress and the Commission have recognized that corporations today must be socially conscious institutions with a developed sense of responsibility to the community and that where a corporation is dealing with problems of corporate policy having political and social ramifications, it is particularly important that such matters not be left to the uncontrolled judgment of the corporate managers, but rather that the shareholders should have a voice in such decisions. The preclusion of a shareholder vote on such matters, as endorsed by the Commission in this case, precisely reverses the result intended by the Securities Exchange Act and by the Proxy Rules themselves.

1/ Thomas M. Clusserath, The Amended Stockholder Proposal Rule: A Decade Later, 40 Notre Dame Lawyer 13, 39 (1965).

I. IN ACCORDANCE WITH THE BROAD PURPOSES OF THE SECURITIES EXCHANGE ACT AND THE PROXY RULES, ALL SHAREHOLDER PROPOSALS MUST BE INCLUDED IN MANAGEMENT'S PROXY MATERIALS UNLESS THERE IS A CLEAR SHOWING OF AFFIRMATIVE REASONS FOR EXCLUSION.

At the time of the enactment of the Securities Exchange Act of 1934, it had become widely recognized that many of America's major corporations were controlled by small managerial groups which were in a position to direct the affairs of the company without regard to the wishes of the shareholders. Moreover, by reason of their manipulation of the proxy device, these managerial groups were able to perpetuate themselves in office. The pervasiveness of the separation of corporate ownership from effective control of the corporation was authoritatively documented in 1932 by Berle and Means in their classic work, The Modern Corporation and Private Property.

The rapid growth in the size of corporations and the number of shareholders, and the widespread geographic dispersion of stock ownership, contributed to this separation of ownership from control. As it gradually became impossible for shareholders generally to appear and vote in person at annual corporate meetings, the technique of management solicitation of shareholder proxies came into existence; management would distribute proxy materials to all shareholders

in advance of the meeting and solicit authority to vote their shares.

The power to control the content of the proxy materials placed in the hands of management enormous control over the voting of the shares represented at the annual meeting. Such control led to virtually automatic re-election of existing managements and to a virtual assurance that management's views on any particular current problem would prevail. To take an extreme but historically accurate example,[1/] if management distributed proxy materials which did not mention the fact that a particular issue would be discussed at the meeting, and if the shareholders generally then gave management a general proxy to vote their shares, it would be a foregone conclusion that management's views would prevail on the issue involved.

To respond to this problem Congress, in Section 14(a) of the Securities Exchange Act of 1934, authorized the Securities and Exchange Commission to promulgate such rules and regulations with respect to the solicitation of proxies as might be "necessary or appropriate in the public interest or for the protection of investors". 15 U.S.C. § 78n, 48 Stat. 895

1/ See Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce 78th Cong. 1st Sess., 169-170 (1943) (hereinafter 1943 House Hearings).

(1934) (emphasis supplied). As stated in the leading case of SEC v. Transamerica Corporation, 163 F.2d 511, 518 (3d Cir. 1947, cert. denied, 332 U.S. 847 (1948).

> "The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a)."

Since "fair corporate suffrage" was considered to be "an important right that should attach to every equity security bought on a public exchange",[1/] it was the purpose of the Act and of the Proxy Rules subsequently promulgated by the SEC to provide shareholders with a voice in the affairs of their companies and thus enable them, to some extent at least, to prevent financial irregularities and to limit or qualify the control of management "in the public interest". See SEC v. Transamerica Corporation, supra.

As one of its earliest steps in regulating proxy solicitation, the SEC dealt with the situation described above (p. 18) where management solicited proxies but failed to tell its shareholders of a shareholder proposal that was to be presented for voting at the annual meeting. The very first time such an omission came to the attention of the Commission, which was during the 1938-1939 proxy season,

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1/ J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964), citing H.R. Rep. No. 1383, 73rd Cong. 2d Sess., 13.

the Commission required management's proxy materials to make reference to that proposal so that all shareholders would be forewarned and would be given an opportunity to vote for or against the proposal by proxy.[1] This action was based upon the Commission's view that a management proxy solicitation "which did not include . . . [shareholder] proposals and the position of the management [with respect to such proposals] was obviously misleading, because the soliciting material purported to tell the stockholders everything that was going to be taken up at a meeting that the management knew about."[2]

Soon thereafter this attitude on the part of the SEC -- namely, its conviction that every management proxy solicitation should include every proposal to be offered by a shareholder -- was embodied in formal rules. In 1940 the Commission ruled that the proxy statement must include "any matters which the persons making the solicitation [i.e., management] are informed other persons intend to present for action at such meeting . . . .",[3]

1/ See 1943 House Hearings, 169-170.

2/ Id., at 170.

3/ Sec. Ex. Rel. No. 2376 (1940), 5 Fed. Reg. 174 (1940).

and in 1942 the Commission restated the requirement as follows:

> "In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal [in its proxy materials] . . . . Further, if the management opposes such proposal, it shall, upon the request of such security holder, include in its soliciting material the name and address of such security holder and a statement of such security holder setting forth the reasons advanced by him in support of such proposal: Provided, however, that a statement of reasons in support of a proposal shall not be longer than 100 words . . . ." Rule X-14A-7, 7 Fed. Reg. 10656 (1942) (emphasis supplied).

Thus the Commission made clear the right of every corporate shareholder to have his views presented to his fellow shareholders in advance of the annual meeting so that all shareholders could consider such views and see to it that their stock would be voted, by proxy or otherwise, in accordance with their own wishes and not simply in accordance with the views of management.

Shortly after these developments the then Chairman of the SEC explained the reasons underlying, and the need for, the shareholder proposal rule in the following terms:

> "[T]he rights that we are endeavoring to assure to the stockholder are those rights that he has traditionally had under State law to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on. But those rights have been rendered largely meaningless through the process of dispersion of security ownership through the country."1/
>
> * * *
>
> "[F]ormerly before . . . we had any rules, . . . before we had any congressional legislation, a stockholder might appear at the meeting and address his fellow stockholders. Today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has today of expressing his judgment comes at the time he considers the execution of his proxy form, and we believe . . . that that is the time when he should have the full information before him and ability to take action as he sees fit.
>
> "The proxy solicitation is now in fact the only means by which a stockholder can act and can perform the functions which are his as owner of a corporation. It therefore seems clear to us that only by making a proxy a real instrument for the exercise of those functions can we obtain what the Congress and this Committee called for in the form of 'fair corporate sufferage'." 2/

1/ 1943 House Hearings, 172.

2/ Id. at 174-175 (emphasis supplied).

In thus seeking to bring about "a revitalization of the democratic process in the conduct of corporate affairs,"[1] the SEC did not initially undertake itself to define what subjects would or would not be "a proper subject for action by the security holders." For a time the Federal agency simply looked to "the laws of the state under which [the company] is organized" to define the matters as to which the shareholders were to be heard.[2] But it soon became apparent that state law would not always provide answers to specific problems, and in the mid-1940's (as further discussed below) the SEC began to develop "a 'common law' of its own as to what constitutes a 'proper subject' for shareholder action." II Loss, Securities Regulation, 906 (1961 ed.). Nevertheless, the SEC's basic approach remained unchanged -- that as a general rule every corporate management had an affirmative legal obligation to include in its proxy materials every shareholder proposal on a "proper subject" under state law.[3]

1/ SEC Tenth Annual Report, A Ten-Year Survey, 31 (1944).

2/ As stated by the Commission in 1945,

> "Speaking generally, it is the purpose of Rule X-14A-7 to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it is organized." Sec. Ex. Act Rel. No. 3638 (1945).

3/ As Professor Loss has pointed out, in case of a conflict between state law and the SEC's own "common law", the latter "undoubtedly would yield, as it should" to state law. Loss, supra, 906.

One principle which clearly emerges from the broad purpose of the Proxy Rules is that there is a strong presumption, with respect to any given shareholder proposal, that the proposal is a proper subject for shareholder action and that, prima facie, management has an obligation to include the proposal in its proxy materials. This principle has been formally recognized by the SEC itself; the Commission has explicitly stated that in any controversy between a shareholder and management as to whether a shareholder proposal should or should not be included in the proxy materials, "the burden of proof" shall be "upon the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material",[1] and the Commission also stated that all "doubts" are to be "resolved in favor of the stockholder" and the inclusion of his proposal.[2]

1/ Sec. Ex. Act Rel. No. 4979 (1954), 19 Fed. Reg. 246 (1954).

2/ Hearing on SEC Enforcement Problems Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 85th Cong. 1st Sess., Pt. 1, at 118 (1957) (hereinafter 1957 Hearings).

Given the history of Section 14(a), its continued and enhanced pertinence to present corporate structure and activity, and the evident purpose of the implementing regulations, we respectfully submit that on the merits of this case the SEC, the respondent here, bears a heavy burden indeed in seeking to defend its legal ruling that Dow was entitled, as a matter of law, to prevent the Medical Committee from using the corporate proxy machinery to seek an expression of the views of its fellow shareholders for the purpose of advising Dow's management on a matter as to which management itself was so deeply concerned on a "moral" basis. Since the Commission has given official sanction to the suppression of the Medical Committee's proposal, and since such suppression is prima facie inconsistent with the objectives of Section 14(a) of the Securities Act and of the Proxy Rules themselves, the Commission's ruling below should be sustained only if the Court is persuaded that no other ruling was possible in the circumstances. In fact, however, the SEC's ruling is not so required and is at odds with the intent of Congress as well as with the very regulations it purports to interpret. We shall now turn to those regulations.

II. THE COMMISSION HERE HAS ACTED INCONSISTENTLY WITH ITS OWN LONG-STANDING INTERPRETATION OF THE SECURITIES EXCHANGE ACT AND PROXY RULE 14a-8(c)(2), UNDER WHICH MANAGEMENT MAY PROPERLY EXCLUDE A SHAREHOLDER PROPOSAL WHICH HAS POLITICAL OR SOCIAL OVERTONES ONLY IF THE SUBJECT MATTER DOES NOT RELATE DIRECTLY TO THE AFFAIRS OF THE CORPORATION AND IS NOT WITHIN ITS CONTROL.

Proxy Rule 14a-8(c)(2), upon which Dow and the Commission below have relied in this case, has a clearly traceable history which definitively demonstrates its meaning for the purposes of this case.

It will be recalled that in 1942 the Commission promulgated Proxy Rule X-14a-7, which, reflecting the basic purpose of the Securities Exchange Act and the already previously established position of the Commission, broadly stated that management was required to include in its proxy materials every shareholder proposal which was "a proper subject for action by the security holders". (See p. 21, supra). Then in 1945 -- as described in a formal release of the Commission (Sec. Ex. Act Rel. 3638 (1945), hereinafter "Release No. 3638") -- a shareholder of an unidentified company submitted a number of proposed resolutions for inclusion in management's proxy materials. When the matter was brought to the attention of the SEC, the agency described the proposed resolutions as follows (in Release No. 3638):

(1) "That dividends paid to stockholders shall not be subject to Federal income tax where the income from which such dividends are paid has already been subject to corporate income taxes";

(2) "That the antitrust laws and the enforcement thereof be revised";

(3) "That all Federal legislation hereafter enacted providing for workers and farmers to be represented should be made to apply equally to investors";

(4) [The shareholder apparently proposed additional resolutions "of similar nature".]

Upon receipt of these proposals the management inquired of the SEC whether the proposals were "proper subjects for action" by the company's shareholders within the meaning of Rule X-14A-7 and whether they would therefore have to be included in management's proxy materials. In response to this inquiry the SEC's Division of Corporation Finance took the somewhat unusual steps of preparing a definitive opinion interpreting the Rule (signed by Baldwin B. Bane, Director of the Division) and of publicizing the opinion in a formal release (Release No. 3638). The release is set forth in the Addendum to this brief (Ad. 1-4).

In his analysis of the specific shareholder proposals involved, Mr. Bane observed at the outset that they did not pertain directly to the affairs of the corporation and that they were efforts to engage the corporation in political activity qua political activity -- which would be improper for "an industrial corporation which is not empowered to engage in political activity". And the opinion then drew a sharp and clear distinction between two types of shareholder proposals.[1/] It was the distinction between, on the one hand, proposals seeking to commit the corporation merely to taking a stand upon "general political, social or economic matters" -- matters not within the control of the corporation -- and, on the other, proposals on "matters relating to the affairs of the particular corporation" and which are "of concern to [the stockholders] as stockholders in such corporation". Id. (emphasis supplied).

1/ Release No. 3638 summarized Mr. Bane's opinion as follows:

> "The opinion of the Director interprets the phrase 'proper subject for action' to mean proposals which relate directly to the affairs of the particular corporation and concludes that proposals which deal with general political, social or economic matters are not, within the meaning of [Rule X-14A-7], 'proper subjects for action by security holders'". (Emphasis supplied).

Problems of the first type, although they may be of interest to the citizenry generally (and may be debated "in other forums"), are matters over which the particular corporation itself has no control, are not of direct relevance to the actual operations of the corporation, and are thus academic or hypothetical to the stockholders as stockholders. Accordingly, they are not "proper subjects" for shareholder action and need not be included in the proxy materials. Conversely, matters which relate directly to the affairs of the particular company, and as to which the corporation is empowered to take action, are necessarily matters of concern to the stockholders, whether the concern be narrowly economic, or broadly economic, or otherwise. Since the only meaningful "forum" for the debate of such matters is the corporate forum itself, shareholder proposals on such matters must be included in the proxy materials.

The effect of the foregoing administrative distinction was to free the corporate machinery of the burden of dealing with proposals that did not relate to the conduct of the corporation's business, that did not seek to require or prohibit corporate operations, and that merely sought to use the corporation as a loud-speaker device to amplify the particular views of the shareholder on some <u>general</u> political,

economic or social issue: (i.e., the content of the federal income tax laws, the enforcement of antitrust, treating investors coequally with workers and farmers). But at the same time it preserved to the shareholders their pre-existing right to vote on any matter of relevance to them as shareholders. This distinction became a matter of the SEC's own "common law" in 1945.1/

The point of the distinction was subsequently illustrated in the case of Peck v. Greyhound Corporation, 97 F. Supp. 679 (S.D.N.Y. 1951), in which the competing considerations were more closely balanced than usual. In 1951, six years after the promulgation of Release No. 3638, a shareholder of the Greyhound Corporation asked Greyhound's management to include in its proxy materials "a recommendation that management consider the advisability of abolishing the segregated seating system in the South" (97 F. Supp. at 680). While relevant to the operations of the bus company, the proposal was not confined to seating on the buses of Greyhound, or, indeed, even to seating on buses (as distinguished from railroads, etc.).2/ Moreover, at that time

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1/ See p. ~~26~~ 3 supra.

2/ As noted in Emerson & Latcham, The SEC Proxy Proposal Rule: The Corporate Gadfly, 19 U. Chi. Law Rev. 807, 833 (1952), the proposal involved in the Peck case "was not limited to segregated seating on the Corporation's buses alone."

the laws of a number of southern and border states affirmatively required segregated seating, at least for intrastate passengers,[1] and it was clearly not within the power of the Greyhound Corporation to ignore or alter state law in this respect. Accordingly, referring expressly to Release No. 3638, Greyhound decided not to include the shareholder proposal in its proxy materials, and under the mandatory procedures referred to in our Statement of the Case, supra, Greyhound submitted the matter to the SEC (id.). The agency ruled "that the proposal is a matter falling within the opinion set forth in Release No. 3638 under the Securities Exchange Act of 1934 and therefore need not be included in [Greyhound's] proxy statement or form of proxy." (97 F. Supp. at 680). When the shareholder sought judicial review of this ruling (by filing a civil suit against Greyhound[2]), the Court

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1/ Note, Rule X-14A-8 of the SEC: Stockholder Participation In Corporate Affairs, 47 Nw. U.L. Rev. 718, 719 (1952). While Morgan v. Virginia, 328 U.S. 373 (1946) had held that a state statute requiring segregation of races was an unconstitutional burden on interstate commerce as applied to interstate passengers on an interstate bus, it did not bar enforcement of state laws as to intrastate passengers or intrastate buses.

2/ It should be noted that in Peck the agency action was taken, not by the Commission itself, but by the Assistant Director of Corporation Finance (97 F. Supp. at 680) and that there had therefore been no "formal ruling by the Commission" (97 F. Supp. at 681). Accordingly, the plaintiff there, unlike petitioner here, was unable to seek appellate review under Section 25(a) of the Securities Exchange Act. (See pp. 12-13 supra).

refused to disturb the agency's interpretation.[1/]

The result in the Peck case, it will be noted, was completely consistent with the analysis which was set forth in Release No. 3638 and which the Medical Committee urges here. And it should also be noted that, consistent with the same analysis, the result in Peck would presumably have been different if the shareholders' resolution had been limited to Greyhound's own policy with respect to seating on its own interstate buses. In that event, as commentators have pointed out, the matter would have been a matter of corporate policy relating directly to the corporation's affairs and within its own control: "Certainly such a policy consideration [would have been] a 'proper subject for action by security holders,' especially if the proposal were cast merely in the form of a recommendation or suggestion." Emerson and Latcham, The SEC Proxy Proposal Rule: The Corporate Gadfly, 19 U. Chi. Law Rev., 807, 833 (1952).

Apparently Peck's consideration of racial problems, and the growing national interest in such matters, prompted

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1/ The Court pointed out that the plaintiff had failed to exhaust his administrative remedies. When the Assistant Director of Corporation Finance had ruled against him, the plaintiff had failed (unlike petitioner here) to carry the matter upward to the full Commission and to obtain a ruling at the highest administrative level. 97 F. Supp. at 681.

the staff of the SEC in 1952 to propose a more detailed version of Release No. 3638 to be embodied in a formal rule referring specifically to "racial" and "religious" matters. In 1952 the Commission amended Rule 14a-8(c),[1] which now reads in relevant part as follows:

> "(c) Notwithstanding the foregoing [rule requiring inclusion of every shareholder proposal] the management may omit a proposal . . . under any of the following circumstances: . . . .
>
> "(2) If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of . . . promoting general economic, political, racial, religious, social or similar causes; . . . ." 17 C.F.R. Section 240.14a-8(c) (emphasis supplied).

Despite the new specific references to "racial" and "religious" causes, it is clear that the Commission's purpose was simply to codify the existing administrative interpretation as set forth in Release No. 3638. When the new 1952 language was written, Mr. Baldwin B. Bane, the author of Release No. 3638 and still the Director of the Division of Corporation Finance, stated flatly that the new language embodied in Rule 14a-8(c)(2) was intended to set forth "the substance of Exchange Act Release No. 3638 dealing

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1/ Sec. Ex. Act Rel. No. 4775, 17 Fed. Reg. 11431 (1952).

with the omission of certain types of [shareholder] proposals."1/ It was therefore the official intention of the SEC, when it promulgated the rule, to continue in force for the future the seven-year-old principle that management could deny a shareholder a right to be heard on any "general" economic, political, or social matter (meaning a matter not directly relating to the operations of the corporation and not within its control) but that the corporation must recognize the right of shareholders to vote on any matter relating directly to the affairs of the particular corporation and thus being of concern to the shareholders as shareholders.

It may be that on this appeal the Commission will contend that it has not in fact consistently adhered to the foregoing principles, that from time to time (e.g., through isolated unpublished rulings) it has applied some other principles, and that some other administrative interpretation of the Securities Exchange Act and the Proxy Rules therefore exists to justify its ruling in this case. If so, a question will arise as to which of the agency's diverse interpretations should control. One answer is that the agency's interpretation in the formative years after the enactment of the Securities Act is entitled to particularly great weight. As the

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1/ Letter from Baldwin B. Bane to John H. Mathis, Vice President, American Society of Corporate Secretaries, dated February 1, 1952, in SEC Docket File No. S 7-35-6-2.

Supreme Court has frequently emphasized, where a statute confers responsibility on an administrative agency and a question of statutory interpretation later arises, the courts pay particular respect to the agency's interpretation of the statute in the early years after its enactment. Thus in its unanimous opinion in Udall v. Tallman, 380 U.S. 1, 16 (1965), the Court said:

> "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Power Reactor Co. v. Electricians, 367 U.S. 396, 408."

We submit, therefore, that in this case this Court must give particularly great weight to the Commission's consistent public position that the Securities Act itself and the Proxy Rules promulgated thereunder do not authorize the exclusion from management's proxy materials of a shareholder proposal of the kind presented here. In short, the foregoing administrative history by itself strongly points to the conclusion that the Commission's action in this case was beyond its statutory authority.

III. SINCE PROXY RULE 14a-8(c)(5) RELATING TO "ORDINARY BUSINESS OPERATIONS" WAS DESIGNED SOLELY TO EXCLUDE MATTERS WHICH LIE EXCLUSIVELY WITHIN MANAGEMENT'S PROVINCE UNDER STATE LAW, THE RULE DOES NOT AUTHORIZE EXCLUSION OF THE MEDICAL COMMITTEE'S PROPOSAL.

In the proceedings below counsel for Dow took the view that the Medical Committee's proposal -- a proposal that management consider an amendment to Dow's Certificate of Incorporation with respect to napalm -- related to Dow's "ordinary business operations" and was thus excludable from management's proxy materials under Rule 14a-8(c)(5). But the suggestion confronts an immediate obstacle: it is completely inconsistent to suggest, on the one hand, that the Medical Committee was trying to delve too deeply into the internal operations of Dow and at the same time to suggest that the Medical Committee's proposal was too "general" and thus not sufficiently related to Dow's affairs to justify inclusion.

Moreover, in view of the deep "moral" soul-searching in which Dow's management became engaged as a matter of "conscience" in its own "decision-making process" with respect to napalm, and in view of the admitted potential harm which management's napalm decision threatened to the company (e.g., in its ability to remain "competitive" in hiring personnel)[1/]

1/ See p. 3, supra.

there is reason to doubt whether Dow's counsel was really serious in suggesting that this intensely difficult policy question was merely a matter relating to the company's "ordinary business operations" within the meaning of the Rule. For the same reason we think it improbable that the Commission will actually rely on Rule 14a-8(c)(5) on this appeal. On the other hand, if the Commission here contends that its action was justified by that Rule, there will be two short answers to that contention.

First of all, it is indisputable that when the Commission promulgated Rule 14a-8(c)(5) and used the phrase "ordinary business operations," it intended the phrase to "have the meaning attributed to it under applicable state law."[1/] (Emphasis supplied). Turning to the law of Delaware, where Dow is incorporated, Section 242(a)(2) of that state's General Corporation Law[2/] recites that amendments to the Certificate of Incorporation are appropriate to "change, substitute, enlarge or diminish the nature of [the company's] business," and Section 242(d) then requires a vote of the stockholders

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1/ Statement of Chairman Armstrong, in 1957 Hearings, 118. By the same token, Professor Loss reads Rule 14a-8(c)(5) as being only a particularization of Rule 14a-8(c)(1) requiring that a proposal be a proper subject for action by security holders under the law of the state of incorporation. II Loss, Securities Regulation, supra, at 908-09.

2/ Chapter 1, Title 8, Delaware Code.

in order to make such an amendment. In fact, Dow's Certificate of Incorporation presently lists categories of products which the Company is empowered to produce,[1/] and any change in those listings -- including the change proposed by the Medical Committee -- is a matter, under the law of Delaware, which must ultimately be decided by the stockholders.[2/] In short, it is simply beyond dispute that the Medical Committee's proposal for the amendment of Dow's Certificate of Incorporation is a proper subject for shareholder action under state law and is not a matter of "ordinary business operations" within the exclusive province of management either under state law or under Rule 14a-8(c)(5).

Finally, lest there be any doubt on this question, it should be noted that the sole purpose of Rule 14a-8(c)(5) was to prevent shareholders from seeking to insert themselves

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1/ Specifically, Article III(a) of the "Composite Certificate of Incorporation of the Dow Chemical Company" (which is a matter of public record) authorizes the company to "manufacture, produce, buy, sell and deal in chemicals of every description, organic and inorganic, natural or synthetic, in the form of raw materials, intermediates, or finished products . . . ."

2/ Section 242(d)(1) of the General Corporation Law provides that the formal process of amending the certificate of incorporation must be initiated by the directors, but, as noted in the text, an actual amendment may be made only upon a vote of the majority of the stockholders, thus establishing that the subject of amendment is a proper subject for shareholder action. Since the Medical Committee's proposal in this case is only a request that the directors consider the advisability of initiating the amendment process, it is in no sense an effort to interfere with the directors' rights in the matter.

into day-to-day administrative problems as to which they have far less relevant knowledge than management and less competence and expertise.[1] To let the shareholders as a group decide management problems at corporate meetings was considered "manifestly impracticable."[2] But the issue raised by the Medical Committee is obviously not a problem of that kind. It is a "moral" issue with potentially broad implications both for the company itself and for the people and the Government of the United States. It is difficult to see how it can be seriously argued that the management of Dow has greater competence to deal with such matters than the 90,000 shareholders of the company.

1/ The Commission was apparently prompted to promulgate the Rule by comments (from various interested companies and individuals) to the effect that matters involving ordinary business discretion could not adequately be explained by any statement which it was practical to include in the proxy materials; that shareholders should not be permitted to become involved in detailed business affairs as to which they do not have adequate knowledge; and that shareholder proposals concerning such day to day management problems would seriously interfere with the corporation operations. See SEC Docket File No. S 7-65-1, Transcript of Proceedings, Conference on Proxy Rules, 132-133, 163 (1953); SEC Docket File No. S 7-65-6, Memorandum of A.T. and T., 21-22 (1953).

2/ See Statement of Chairman Armstrong, 1957 Hearings, 118.

IV. THE COMMISSION'S RULING BELOW BRINGS ABOUT RESULTS WHICH ARE CONTRARY TO THE "PUBLIC INTEREST" MANDATE OF THE SECURITIES EXCHANGE ACT AND THE PROXY RULES.

An analysis of the Commission's ruling below and its logical implications demonstrates that in several respects the ruling is both irrational and contrary to the "public interest" standard of the Securities Exchange Act itself.

An obvious initial irrationality inherent in the Commission's position arises simply from the fact that Dow's management itself has undertaken to make a major corporate policy decision, not solely through the exercise of any "business" or managerial expertise, but on the avowed basis of "moral" and political values -- and yet both Dow and the SEC have decided that the owners of the business have no right even to advise management of their own value judgments on that policy problem. We submit quite simply that there is something fundamentally wrong with that position. It just does not make sense to say that management alone can make such judgments and that the shareholders cannot even express a view thereon. Indeed, virtually all of the commentators who have considered the operation of the Proxy Rules have pointed out that, whatever might be the situation where a shareholder "is trying to embroil the corporation in disputes

which do not presently concern it," the shareholders must have the right to be heard "when the corporation is already engaged in the activity dealt with by the proposal." Note, Corporate Political Affairs Programs, 70 Yale L. J. 821, 847 (1961). In such circumstances "the management to a considerable degree would appear to have resolved the question of the propriety of the subject matter by itself entering the field." Emerson & Latcham, The SEC Proxy Proposal Rule: The Corporate Gadfly, 19 U. Chi. L. Rev. 807, 835 (1952). It simply cannot be the law that where corporate managers have embroiled themselves in a moral or political problem with potentially serious consequences for the company, the owners of the business are legally excluded from expressing their views to management on the matter.

A. Since Section 14(a) of the Securities Exchange Act was Intended to Restore to Corporate Shareholders the Rights They Traditionally Enjoyed Under State Law, and Since the Law of Delaware Gives Dow's Shareholders an Affirmative Right to be Heard on the Instant Problem, the Ruling Below Departs from the Intent of the Statute.

Shortly after the enactment of the Securities Exchange Act, as noted above, the SEC recognized that it was "in the public interest" that the Proxy Rules be so devised as to restore to corporate shareholders the voting rights they traditionally enjoyed under state law in order to

narrow the gap between ownership and control.[1] If the law of the state of incorporation gave the shareholders of a particular corporation ultimate control over a particular issue, through a shareholder vote, it was the purpose of the Securities Exchange Act itself to insure, through appropriate Proxy Rules, that the shareholders could vote on the same subject by proxy.

We have also noted above that under the law of Delaware Dow's shareholders have the right to decide, ultimately, whether an amendment to Dow's certificate of incorporation should be made in order to "enlarge or diminish" the nature of its business -- which means that the Medical Committee's proposal that management consider the initiation of the amendment process was clearly a proper subject for a shareholder vote at Dow's annual meeting.[2] And yet the SEC has ruled in this case that, whether or not the shareholders might vote on the Medical Committee's proposal at the annual meeting, they may not vote on the proposal by proxy. This ruling squarely conflicts with the intent of the Securities Exchange Act and is therefore beyond the Commission's statutory authority.

1/ See p. 22, supra.

2/ See pp. 37-38, supra.

B. The Ruling Below Insulates Management from the Views of the Shareholders in a Way Which is Flatly Inconsistent with the Intent of the Securities Exchange Act

The legislative history of Section 14(a) of the Securities Exchange Act establishes beyond any question that one of the basic purposes of the Act was to insure that management's proxy materials would forewarn shareholders, and would give them a right to vote by proxy, on all "major questions of [company] policy" which might come before the stockholders' meeting.[1/] Although it is clearly unnecessary and impractical to allow shareholders to vote by proxy on "ordinary" day-to-day management problems,[2/] the Congress has thus declared in effect that the "public interest" criterion of Section 14(a) of the Securities Exchange Act requires that shareholders be given a voice on the larger questions of corporate "policy."

1/ See Sen. Rep. No. 792, 73d Cong., 2d Sess., 12 (1934):

> ". . . it is essential [that the shareholder] be enlightened . . . as to the major questions of policy which are decided at stockholders meetings. Too often proxies have been solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." (Emphasis supplied).

2/ See the discussion of "ordinary business operations" under Rule 14a-8(c)(5), p. 39, supra.

Moreover, with the steady increase in the concentration of industrial assets over the last 35 years, there is today an even greater need for "responsibility" in the development of corporate policy, and the avoidance of exclusive control by management, than there was in 1934. Today the major corporations have become major participants in various social causes, through their charitable contributions;[1] they have become active participants in political movements;[2] and their business operations have wide ramifications in the economic and social development of the community at large. With such social functions having been thrust upon the corporation, it is of extreme importance that a corporation operate as a "socially conscious institution"[3] in formulating its own policies. And if there is any one field of corporate policy in which shareholder participation would seem to be most appropriate, that field is precisely the area of social and political activity.

1/ A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. Sup. Ct. 1953); Union Pacific Railroad Co. v. Trustees, 329 P.2d 398, 400-402 (Utah Sup. Ct. 1958).

2/ Note, Corporate Political Affairs Programs, 70 Yale L. J. 822-836 (1961).

3/ 70 Yale L. J., supra, at 821, n. 6.

Conceivably management may have greater expertise than shareholders in matters of narrow technical or financial "policy", but there is no reason to suppose, for example, that Dow's 90,000 shareholders are not as competent as management to speak to the political, social, or "moral" aspects of the policies of the company.

The need for shareholder participation in these areas of corporate policy has been recognized in various contexts. For example, the Congress has enacted legislation with respect to the political activities of corporations, and the Supreme Court has emphasized that one of the basic considerations underlying the legislation was a Congressional conviction that "corporate officials [have] no moral right to use corporate funds for contributions to political parties without the consent of the stockholders." United States v. CIO, 335 U.S. 106, 113, 137-138, 156 (1948) (emphasis supplied). In short, it is in just such areas of political and social policy that there is a particularly "acute" need to avoid exclusive managerial control without shareholder participation.[1/]

1/ As observed by commentators, the problem of corporate responsibility is "presented in its most acute form when political programs are adopted by large publicly held corporations controlled by their own management . . . ." Note, Corporate Political Affairs Programs, 70 Yale L. J. 821 (1961).

The Commission's ruling below brings about precisely the opposite result. The Commission has said that where a corporation is faced with a difficult "moral" decision as to whether the corporation, through its actual business operations, shall support particular political policies, the decision is one to be made exclusively by management and that the shareholders have no right to be heard, even on an advisory basis, in the decision-making process. This result, we submit, is both irrational and contrary to the "public interest" mandate of the Securities Exchange Act.

C. In the Area of "Social Responsibility" the Ruling Below is Squarely Inconsistent with Public Policy

In a variety of ways the States, the Congress, and the Executive Branch of the Federal Government have made clear that it is the public policy of the United States to foster and encourage private American corporations to play constructive roles in the social problems of the nation. For example, state governments have encouraged corporations to contribute financially to various social causes, rejecting the notion that such activities are ultra vires;[1/] the Congress has provided the same affirmative encouragement

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1/ See, for example, the General Corporation Law of Delaware, Ch. 1, Title 8, Section 122(9), authorizing charitable donations.

through the tax laws;[1] and in recent years the Executive Branch of the Government has called for additional corporate support for various social programs and has offered inducements to that end.[2]

The Commission's ruling in this case, however, constitutes a clear step in the opposite direction. Suppose, for example, that the management of a major American company were considering the possibility of embarking upon a program of making tax-deductible contributions to foster job training in ghetto areas. Proponents of such a program could argue that it would help to create a reservoir of skilled labor for the company's own purpose, that it would serve to meet the company's "moral" obligations as a socially conscious institution, and that it would be an affirmative step toward cooperation with the Federal Government's call for private assistance in such programs.[3] Obviously any such program would make use of the corporate resources and would be a matter within its control and pertaining directly to

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1/ Section 170, Internal Revenue Code, 26 U.S.C. § 170.

2/ See the statement of the President of the United States on March 16, 1968, expressing the "hope that the . . . private employers of America can help the Government take some of this responsibility" for the training of ghetto unemployed. 4 Weekly Compilation of Presidential Documents 534 (1968).

3/ Economic Opportunity Amendments of 1967, 81 Stat. 685, 42 U.S.C. § 2740(a)(8): H. Rep. No. 866, 90th Cong., 1st Sess. (1967), in 1967 U.S. Code Cong. and Admin. News, 2428, 2445.

its affairs. Nevertheless, the clear implication of the Commission's ruling below is that a particular shareholder who favored the program, and who sought to use the proxy machinery to obtain shareholder support for the idea, would have no right to submit such a proposal for inclusion in the corporate proxy materials.

It may be noted that such a ruling would bring about a rather remarkable internal inconsistency in the Commission's administration of the Proxy Rules. In the past the Commission has apparently taken the position that, where a shareholder wishes to be heard in opposition to the expenditure of corporate funds for charitable purposes, such essentially negative proposals must be included in management's proxy materials.[1/] Under this administrative doctrine a shareholder who opposed the hypothetical ghetto program would be entitled to have a proposal to that effect included in the proxy materials, but the shareholder who sought to include a proposal in favor of this progressive program would be precluded from presenting any views on precisely the same issue.

1/ See SEC, 33rd Annual Report, 40 (1967); SEC, 34th Annual Report, 42 (1968).

This distinction between shareholders who propose and those who oppose such corporate activities is both irrational[1/] and indefensible in terms of the language of the Proxy Rules themselves. After all, a shareholder who is philosophically opposed to ghetto job training, and who submits a proposal on that issue, would be "promoting" a political or social "cause" just as much as the shareholder who favored such programs.

More importantly, however, the Commission's position is indefensible in terms of public policy. Its effect is to build into the Proxy Rules a clear official bias against the encouragement of corporate social responsibility. As the Commission itself made clear as early as 1943, such biased prejudgments as between different shareholder points

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1/ See Wirta v. Alameda-Contra Costa Transit District, 434 P.2d 982, 986-987 (1967), in which the Supreme Court of California (en banc) recently struck down on Federal constitutional grounds a "paradoxical" limitation on advertising in public buses which had the practical effect, with respect to various public issues, of allowing the presentation of one side of the argument but not the other (e.g., "a theater may advertise a motion picture that portrays sex and violence, but the Legion of Decency has no right to post a message calling for clean films").

of view are wholly improper.[1/] Since the Federal Government has made clear that it is "in the public interest" for corporations to shoulder their social responsibilities, and since the Commission has authority to promulgate only those Proxy Rules that are "in the public interest," we submit that the interpretation of the Rules by the Commission here is inconsistent with Section 14(a) of the Securities Exchange Act and plainly erroneous.

CONCLUSION

Petitioner respectfully requests that on this appeal the Court (a) declare as a matter of law that the Proxy Rules of the SEC do not authorize Dow's management to exclude from its proxy materials the shareholder proposal presented by the Medical Committee and (b) remand the case to the Commission for further proceedings not inconsistent with

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1/ At the 1943 House Hearings the then Chairman of the Commission took pains to "stress" to Congress:

> ". . . that we are not concerned, nor . . . [can] we . . . properly be concerned, with the wisdom or good sense of any individual proposals that any stockholders make . . ..
>
> "I do not believe that the stockholders want either the Commission or anyone else to tell them what proposals they may have a real chance to act on and what proposals should be ruled out . . .." 1943 House Hearings, 180-181.

the foregoing declaration. Upon remand it will be for the Commission to decide, in its discretion, whether or not to take action of any kind with respect to this continuing controversy between the Medical Committee and Dow.

Respectfully submitted,

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ADDENDUM

SEC: Securities Exchange Act of 1934,
Release No. 3638 (January 3, 1945):

The Securities and Exchange Commission today released an opinion of Baldwin B. Bane, Director of its Corporation Finance Division, dealing with the meaning of the phrase "a proposal which is a proper subject for action by the security holders", as used in Rule X-14A-7 of Regulation X-14 of the General Rules and Regulations promulgated pursuant to the provisions of the Securities Exchange Act of 1934, which relates to the solicitation of proxies under several of the Acts which the Commission administers. Rule X-14A-7 requires companies subject to Regulation X-14 to include in management proxy statements proposals intended to be presented by a stockholder which are proper subjects for action by the security holders and to provide means by which the security holders can vote for or against such proposal. It further provides that if the management opposes such a proposal, it shall, upon the request of the security holders, include in its soliciting material the name and address of such security holder and a statement of not more than one hundred words by such security holder setting forth the reasons in

support of such proposal. The opinion of the Director interprets the phrase "proper subject for action" to mean proposals which relate directly to the affairs of the particular corporation and concludes that proposals which deal with general political, social or economic matters are not, within the meaning of the rule, "proper subjects for action by security holders."

The text of the opinion follows:

"This is in reply to your recent letter in which you inquire whether certain proposals presented to you by a stockholder of the company for inclusion in the management proxy statement pursuant to the provisions of Rule X-14A-7 of Regulation X-14 of the General Rules and Regulations promulgated pursuant to the provisions of the Securities Exchange Act of 1934 are proper subjects for action by your company's security holders at its next annual meeting. The resolutions presented by such stockholder propose that dividends paid to stockholders shall not be subject to Federal Income Tax where the income from which such dividends are paid has already been subject to corporate income taxes; that the anti-trust laws and the enforcement thereof be revised; that all Federal legislation hereafter enacted providing for

workers and farmers to be represented should be made to apply equally to investors. Other resolutions which are proposed are of similar nature. You state that these proposals are obviously of a political and economic nature and that your corporation is an industrial corporation which is not empowered to engage in political activity nor is such activity within the scope of its business operations.

"Speaking generally, it is the purpose of Rule X-14A-7 to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it is organized. It was not the intent of Rule X-14A-7 to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature. Other forms exist for the presentation of such views.

"It is my conclusion that the proposals which have been presented to you are not "proper subjects for action" by your company's stockholders within the meaning

of that phrase as used in Rule X-14A-7. Consequently, it will be unnecessary for you to include the proposals in the management's proxy statement if you do not wish to do so."

* * *

Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. § 78n(a) (1964):

"(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title."

* * *

Rule 14a-8 of the Proxy Rules, 17 C.F.R. §240.14a-8 (1969):

§ 240.14a-8 Proposals of security holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which security holders can make the specification provided for by Rule 14a-4(b) (§ 240.14a-4(b)). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This section does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address of the security holder is omitted from the proxy statement, it shall be furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a-6(a) (§ 240.14a-6(a)). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement.

(c) Notwithstanding the foregoing, the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

(2) If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or

(3) If the management has at the security holder's request included a proposal in its proxy statement and form of proxy relating to either of the last two annual meetings of security holders or any special meeting held subsequent to the earlier of such two annual meetings and such security holder has failed without good cause to present the proposal, in person or by proxy, for action at the meeting; or

(4) If substantially the same proposal has previously been submitted to security holders, in the management's proxy statement and form of proxy, relating to any annual or special meeting of security holders held within the preceding five calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the three calendar years after the latest such previous submission: *Provided*, That:

(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or

(iii) If the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto.

(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

(d) Whenever the management asserts that a proposal and any statement in support thereof may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission, not later than 20 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to § 240.14a-6(a), or such shorter period prior to such date as the Commission may permit, a copy of the proposal and any statement in support thereof as received from the security holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel. The management shall at the same time, if it has not already done so, notify the security holder submitting the proposal of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

(Sec. 14, 48 Stat. 895; 15 U.S.C. 78n) [19 F.R. 247, Jan. 14, 1954; 32 F.R. 20964, Dec. 29, 1967]

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Order of the
Securities and Exchange Commission

SUPPLEMENTARY MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT, IN RESPONSE TO THE REPLY BRIEF FILED BY THE PETITIONER

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UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEDICAL COMMITTEE FOR HUMAN RIGHTS, Petitioner, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.	Docket No. 23105

SUPPLEMENTARY MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT, IN RESPONSE TO THE REPLY BRIEF FILED BY THE PETITIONER

1. The Medical Committee's response to the Commission's contention that this Court lacks jurisdiction because the petition for review was not timely filed (SEC Br. 7-9)[1/] seems to be that the Commission has waived any objection on the ground of timeliness (Reply 10-15). But no action of the parties can create jurisdiction where none exists. See cases cited at SEC Br. 9.

The Medical Committee also contends in this connection (Reply 14-15) that the Commission did not comply with a provision in Rule 22(k) of its Rules of Practice, 17 CFR 201.22(k), which, in part, states that "[a]

1/ References to our answering brief on the merits are cited herein as "SEC Br. __." References to the brief on the merits filed by the Medical Committee are cited as "MC Br. __." References to the Medical Committee's Memorandum in Opposition to the Commission's motion to dismiss this petition are cited as "Mem. __." References to the reply brief on the merits filed by the Medical Committee are cited as "Reply __." References to the Joint Appendix are cited as "App. __a."

2. While the Medical Committee urges that there is a "strong probability" that the Commission made a legal determination that the Medical Committee's claim is erroneous (Reply 41), the minute of Commission action, which reflects its determination in this matter (App. 46a), does not suggest the Commission's acceptance of the legal position of its staff; it expressly adopted no more than the "recommendation" of its staff not to take any enforcement action.[3/]

The Medical Committee naively claims that the Commission "[o]bviously . . . knows what it did and could easily tell the Court" (Reply 40-41, cf. 8-9), suggesting that the Commission, despite changes in membership, must now articulate a reason for the action of an earlier Commission that did not at the time attempt to express a consensus. The petition for review does not and cannot purport to seek review of whatever might be a subsequently adopted position of the Commission.

The fact that the Commission did not express its reasons for its determination to take no action and is not now doing so does not require

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3/ The Medical Committee originally sought to uphold its burden of showing this Court's jurisdiction over its petition to review by claiming that the Commission "necessarily" made a legal determination on a contested issue of law (Mem. 1, 8, 9, 11, 15) and expressly relied upon cases the relevance of which depends upon the accuracy of that claim (Mem. 15-24). It would seem that the constant erosion of the Medical Committee's original unqualified position to its present assertion of a mere "probability" demonstrates that its petition for review was conceived in error.

with the earlier decisions that the Medical Committee relied upon (Reply 27-32), is whether the agency's authority with respect to the various "threshold" questions is itself discretionary. Thus, as we have noted (SEC Br. 26 nn.32 & 33 and accompanying text), in each case relied upon by the Medical Committee the agency was held to be without discretion on the question whether or not it should consider the "threshold" issue--i.e., in every case the agency was required by law to resolve the "threshold" issue; and in every case it was with respect to that question alone that judicial review was permitted.

The Medical Committee says of Schilling that "it was not possible for the Court to treat the [relevant threshold] question . . . as a legal issue separable from the discretionary elements of the case, and [that] the Court distinguished McGrath v. Kristensen [one of the authorities principally relied upon by the Medical Committee] on that ground" (Reply 33-34). But the import of the Medical Committee's language is plainly to admit that in Schilling consideration of the "threshold" question of law as well as resolution of the substantive issue were both found to be entirely discretionary.[5/] As the Medical Committee

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5/ The Medical Committee also states that the basis of decision in Schilling was the express language of the Trading with the Enemy Act. But the Court twice expressly stated that its conclusion was alternatively based upon the fact that agency action had been committed by law to agency discretion. See 363 U.S. at 670, 676.

Finally, petitioner attempts (Reply 34-35 n.2) casually to distinguish the long line of authorities cited by the Commission (SEC Br. 28-29) as adhering to the Schilling reasoning. But each of the cases cited stands squarely for the proposition that where a statute confers upon an agency discretion as to whether the agency will exercise its discretion, the courts will no more pass upon threshold questions, whatever their nature, than they will upon the more substantive discretionary aspects of the case.

this Court to "assume, for the purposes of its consideration of the jurisdictional issue, that the Commission's decision below was a pure decision of law . . .," as claimed by the Medical Committee (Reply 10). Nor does it follow that the Commission is confessing error, as the Medical Committee claims (Reply 2). Since the basis of the Commission's decision is not known, it is not apparent what error is confessed.[4/]

3. Even had the Commission made a legal determination on a "threshold" (see Mem. 16) question, and even had it erred in doing so, judicial review would nevertheless be unavailable because the question raised by the Medical Committee before the Commission is in all its aspects one with respect to which "agency action is committed to agency discretion by law," 5 U.S.C. §701(a)(2).

The Medical Committee contends that a doctrine of "partial reviewability" is applicable (Reply 28). In this connection it purports to distinguish Schilling v. Rogers, 363 U.S. 666 (1960) (Reply 33-34), which we cited as holding that where discretion is unqualified judicial review is unavailable (SEC Br. 27, 28, 30). In doing so, the Medical Committee fails to recognize that the key to reviewability, revealed by comparing the Supreme Court's opinion in Schilling

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4/ Moreover, as the court in Hungerford v. United States, 307 F. 2d 99 (C.A. 9, 1962), cited by the Medical Committee (Reply 2), suggests, even should such a failure to respond on the merits be deemed a confession of error, such a finding alone is insufficient as a basis upon which a court may predicate a legal conclusion. Id. at 102 n. 5.

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concedes (Reply 36, n.1), that is precisely the situation here: ". . . in shareholder-management disputes of this kind the Commission is free to decide the issue or not, as it chooses . . ." (emphasis added) (see also, Mem. 15).

The Medical Committee's request that the Commission take enforcement action (App. 26a-31a), which is at the core of the instant case, sought the exercise of a judgment explicitly committed to the Commission's discretion by Section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e); likewise within the Commission's discretion, as we have just noted, was whether the Commission would even consider the Medical Committee's request.[6/] The Medical Committee treats with a passing footnote reference our discussion (SEC Br. 30-31) of this Court's recent en banc decision in Curran v. Laird, No. 21040 (November 12, 1969), in which was recognized "the inappropriateness or even mischief involved in appraising a claim of error . . ." within that "narrow band of matters that are wholly committed to official discretion . . ." (Slip Op. at 15).

The poverty of the Medical Committee's position is further revealed by its erroneous claim (Reply 35) that in the cases it cited in support of its doctrine of "partial reviewability" (Mem. 18-24, Reply 27-32) the agencies involved lawfully could have chosen not to decide the issue upon which the courts were willing to grant review. As we have noted (SEC Br. 26 n.32), the holding in each case is to the contrary. Office Employees Int'l Union v. NLRB, 353 U.S. 313 (1957), cited as an

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6/ See 17 CFR 202.1(d): ". . . the granting of a request for an informal statement by the Commission is entirely within its discretion."

"example" in support of this claim (Reply 35), does not support the Medical Committee's position. The Court there noted that the question presented was ". . . whether the Board may . . . refuse to assert jurisdiction over labor unions, as a class, when acting as employers." 353 U.S. at 318 (emphasis supplied). The Court concluded that ". . . it was [not] within the Board's discretion to remove unions as employers from the coverage of the Act . . . ." Id. at 319. It should be noted, moreover, that nothing in that opinion can be construed as a determination by the Supreme Court that, on an individual basis, the Board could not decline to assert jurisdiction over such unions. In neither Red Lion Broadcasting Co. v. FCC, 127 App. D.C. 129, 381 F. 2d 908 (C.A. D.C., 1967), affirmed, 395 U.S. 367 (1969), nor Banzhaf v. FCC, 132 App. D.C. 14, 405 F. 2d 1082 (C.A. D.C., 1968), certiorari denied, sub nom. Tobacco Institute, Inc. v. FCC, 38 U.S. Law Week 3117 (U.S., Oct. 13, 1969) (No. 47), relied upon by the Medical Committee in this connection (Reply 35), was any issue raised concerning a "threshold" legal inquiry; in both, the agency as well as all other parties recognized that a reviewable, substantive legal determination had been made.

4. The Commission has never asserted, as the Medical Committee claims (Reply 21-22), that only those orders actually preceded by evidentiary hearings are reviewable by the courts. We recognize, of course, that where an evidentiary hearing would be useless none

is required. But only those definitive types of agency action are reviewable as to which an evidentiary hearing, if necessary, would be appropriate under applicable law, as Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 (1938) (cited SEC Br. 12), makes clear. The Medical Committee has certainly not suggested any statutory provision or Commission rule which purports to authorize an evidentiary hearing to resolve factual disputes that might have arisen in the present matter.[7/] The very reason the Medical Committee claims it seeks relief in this Court rather than bringing an injunctive action directly against Dow in the district court is because "such a proceeding (which would predictably involve pretrial discovery, pretrial motions practice, and possibly a trial) would be far more burdensome and expensive than the avenue now being pursued by petitioner . . . ." (Mem. 46.) Moreover, whatever "leading commentators" may think of other aspects of Metropolitan Edison (see Reply 21), as we have interpreted the decision it plainly has current vitality and this Court has so recognized. See, e.g., Texas Gas Corp. v. FPC,

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7/ If, however, any tribunal had undertaken to adjudicate the controversy between the Medical Committee and Dow, an evidentiary hearing would have been necessary since there existed an essential unresolved issue of fact as to the purpose for which the Medical Committee submitted the proposal. See Rule 14a-8(c)(2), 17 CFR 240.14a-8(c)(2).

102 App. D.C. 59, 61, 250 F. 2d 27, 29 (1957); and Texaco, Inc. v. FPC, 117 App.D.C. 268, 329 F. 2d 223, certiorari denied, 375 U.S. 941 (1963).[8/]

5. The Medical Committee also asserts (Reply 36 n.1) that whatever this Court may do in this case the Commission could continue to " . . . render all the informal advice it wishes, so long as a proceeding is not involved . . . ." By the Medical Committee's standards, all papers filed with the Commission pursuant to statute or rule would seem to involve "formal procedures" that become a "proceeding" when challenged in some particular in a letter addressed to the Commission by a person claiming injury--at least when the Commission affords the complainant the courtesy of a response. This being so, we think there is no language that the Commission could employ adequately to distinguish between, on the one hand, the kind of reviewable "order" that the Medical Committee claims here to exist and to be the basis of this Court's jurisdiction, and, on the other hand, the informal, advisory opinion that the Commission so often is called upon to provide. Indeed, we think it clear that if the Commission were to label its action as merely advisory it is a safe assumption that the Medical Committee, or persons similarly motivated, would argue with no less

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8/ The commentators notwithstanding, it would seem that even the narrow interpretation of the Metropolitan Edison case that the Medical Committee finds so appalling is followed by this and other circuits, and some of these cases are more recent than the cases cited by the Medical Committee (Reply 21-22), suggesting, perhaps, that the cases it cites are no longer followed. See, e.g., United Gas Pipe Line Co. v. FPC, 86 App. D.C. 314, 316, 181 F. 2d 796, 799, certiorari denied, 340 U.S. 827 (1950); Division of Prod., American Petroleum Institute v. Halaby, 307 F. 2d 363 (C.A. 5, 1962); Texas Eastern Transmission Corp. v. FPC, 357 F. 2d 232, 239 (C.A. 5, 1966).

vigor that the Commission could not merely by the form adopted transform an "order" entered in a "proceeding" into an informal advisory opinion.

The Commission's staff issues thousands of informal opinions or so-called no-action letters [9/] each year, usually involving the question of whether or not, under particular circumstances, a person is free to sell shares without registering them under the Securities Act; but also involving, on occasion, other provisions of the federal securities laws. Such informal opinions or no-action letters are sometimes reviewed by the Commission if a private party so requests. [10/] The situation presented in this case is a variant on that procedure. The essential issue was whether the staff would recommend enforcement action if Dow omitted the Medical Committee's material. The difference is that in the normal no-action situation, there is only one interested private party and accordingly the Commission has not found it necessary to prescribe any rules dealing with the situation. The private party simply writes a letter which is answered.

In the case of stockholder proposals, there are two interested private parties: the management and the shareholder. Consequently, Rule 14a-8(d) provides a procedure by which the position of both may be brought to the Commission's attention. Contrary to the Medical Committee's characterization (Reply 5), the proxy rules do not "expressly" require

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9/ A "no-action" letter is a letter stating that the staff will not recommend that the Commission take enforcement action if a specified course of action is pursued by the person making the inquiry.

10/ See III Loss, Securities Regulation, 1894, 1896 (2d ed. 1961), as supplemented, VI Loss, at 4023, 4024 (1969).

the parties to "submit" the matter to the Commission for any adjudication or decision by it; they merely require that if the management proposes to omit the shareholder's material, this fact, together with the position of the respective parties to the controversy, 11/ be brought to the Commission's attention.

CONCLUSION

For the foregoing reasons and those set forth in our answering brief, the Commission's motion to dismiss should be granted.

Respectfully submitted,

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January 1970.

11/ If the issuer elects to include the shareholder's material, there obviously will be no need for this procedure. Thus, it is applied only where the issuer seeks to exclude what the shareholder wants to have included.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF
THE SECURITIES AND EXCHANGE COMMISSION

PETITIONER'S RESPONSE TO SUPPLEMENTARY MEMORANDUM OF THE SEC

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February 2, 1970

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITIONER'S RESPONSE TO SUPPLEMENTARY MEMORANDUM OF THE SEC

Apparently seriously troubled by the Medical Committee's Reply Brief, the Commission has now taken the extraordinary step of filing a "Supplementary Memorandum" after the case has already been fully briefed in accordance with the Rules. In fact the memorandum is the fifth brief which the SEC has filed in this proceeding on the question of this Court's jurisdiction. Since the

Federal Rules of Appellate Procedure and the Rules of this Court clearly contemplate that the appellant -- the party who has the burden of establishing that error was committed below -- should have an opportunity to reply to all matters raised by the appellee, petitioner thinks it appropriate to file this response to the five numbered points advanced in the Commission's Supplementary Memorandum.

1. The Timeliness of the Petition

The Supplementary Memorandum quotes in full Rule 22(k) of the Commission's Rules of Practice (Mem. p. 2, n.2), a one-paragraph provision which defines how and when the "entry" of an SEC order occurs. Although the Rule contains three sentences, even the most casual reading demonstrates that it is a single, integrated provision under which the requirement that the Commission make every order "available for inspection" is an integral part of the process of "entering" an order. Indeed, the rule could not be otherwise if an aggrieved party is to enjoy the intended benefit of the 60-day period for taking an appeal. The necessary result is that under Rule 22(k) the "entry" of an order does not occur unless the order is immediately made available for inspection.

It should be noted that Rule 22(k) does not define what an "order" is and that the question of the impact of the rule can arise only if it is first assumed -- or found by the Court under the proper "pragmatic" approach[1] -- that the administrative action involved is an "order". But the Commission's latest "timeliness" argument has overlooked this obvious proposition. Specifically, the Commission argues, in one and the same breath, (1) that the Commission's action of March 24, 1969, constituted an "order" whose "entry" on that date started petitioner's time for appeal running for the benefit of the Commission,[2] but (2) that the Commission's

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1/ In determining whether the Commission's action below constituted a reviewable order it is necessary to look, not to "the particular label" which the agency has placed on its own action, but to "the substance" of what the Commission has done. Columbia Broadcasting System v. United States, 316 U.S. 407, 416 (1942). See also Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967); Isbrandtsen v. U.S., 93 App. D.C. 293, 297, 211 F.2d 51, 55 (D.C. Cir. 1954), cert. denied 347 U.S. 990. As observed in petitioner's reply brief (n.2, pp. 36-37), any administrative action which finally denies all administrative relief must be construed as a statutory "order" for the purposes of judicial review, and the Commission clearly took such action in this case.

2/ See Mem. p. 2: ". . . the 'entry' of the 'order' under Rule 22(k) 66 days before review was sought requires dismissal of the petition."

action of March 24, 1969 did not constitute an "order" for the purposes of Rule 22(k)'s requirement that the Commission must make every order available for inspection at once.[1/] The answer, of course, is that the Commission cannot have it both ways: they cannot claim the benefits of the Rule on one assumption and seek to avoid its corresponding burdens on another. Once the Court has made the necessary assumption or finding that the administrative action involved constituted an "order", Rule 22(k) must be deemed applicable in its entirety, and the Commission must accept the consequences of any non-compliance.

The Commission now tacitly concedes that when it made its decision on March 24, 1969, it did not make that decision available for inspection in accordance with the Rule.[2/] Since Lile v. SEC, 324 F.2d 772 (9th Cir. 1963), squarely holds that the time for appeal does not start running until there has been complete

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1/ See Mem. p. 2: "This provision . . . has no application if, as the Commission contends, no 'order' was involved."

2/ The fact of unavailability is discussed in petitioner's Reply Brief, p. 14, and the Commission's Supplementary Memorandum does not dispute that fact.

administrative compliance with the "entry" rule (whatever its provisions may be at the particular time in question[1]), the Commission below never properly "entered" its order in this case, and there is now no basis for argument that the instant petition was untimely filed.

2. The Grounds of the Commission's Decision Below

The petitioner having taxed the Commission with its failure either to admit or deny that its action below was based upon a legal interpretation of the Proxy Rules, the Commission's Supplementary Memorandum now suggests, for the first time, that its failure to date to reveal the grounds of its decision has resulted simply from the fact that the Commission itself cannot now determine the basis of what it did in March 1969.[2] At the same time the Commission carefully refrains from offering even a possible explanation of its action, saying that any such explanation now would amount to "a subsequently adopted

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1/ See petitioner's Reply Brief, p. 13, n.1.

2/ See the Commission's assertion that it is "naive" to suppose that the Commission can now determine the basis of its decision last year (Mem. p. 3).

insists that the Court cannot treat the "legal position" of the staff even as an apparent factor in the Commission's action.

Although the petitioner thinks that this position of the Commission flies in the face of common sense, it really doesn't matter because the precise grounds of the Commission's action, whatever they may have been, have no direct bearing on the question of this Court's jurisdiction. The review statute here involved, Section 25(a) of the Securities Exchange Act, does not say that this Court can review an SEC decision only if it is based upon certain stated grounds; the statute says that whenever an administrative proceeding has led to an SEC decision, with or without stated grounds, the Court must take jurisdiction upon the petition of an aggrieved party, even though the Court may be uncertain as to the basis of the administrative action. At this point this Court has a duty to review the decision below, and the only question which can possibly be open for debate now is the question of the proper scope of that review.

Moreover, the Commission's concession that its staff's recommendation was based upon a "legal position"

as to the interpretation of the Proxy Rules serves to confirm the propriety of petitioner's suggestion (Reply Brief p. 41) that the proper course for the Court now is (a) to review that "legal position" to see whether it is legally sound, (b) to spell out the nature of any error found therein, and (c) to remand the matter to the Commission for further proceedings in accordance with correct legal principles. Since, as we have noted, the staff's "legal position" was at least the apparent basis of the administrative action taken below, an immediate determination of its propriety will serve to avoid an endless waste of effort in the continuing controversy between petitioner and Dow.

3. The Commission's Discretion

The Commission's third point is that, even assuming that the Commission below committed legal error in interpreting the Proxy Rules to the detriment of the petitioner,that erroneous decision of law is not reviewable by this Court (Mem. p. 4). The "key" point, according to the Commission, is the asserted proposition that, if an agency has "discretion" whether or not to decide a question of law (that is, if it is legally free not to decide the

issue), any erroneous legal decision which it actually makes is immune from judicial review, no matter how broad and harmful the impact of that legal ruling.

This proposition is said to derive from the "partial reviewability" cases discussed in petitioner's Reply Brief. The Commission now argues that "in every [such] case the agency was required by law to resolve" the legal question which it did in fact resolve and that this "requirement" was the ratio decidendi of each such case.[1/] This is an extraordinary reading of the cases involved. For example, in Office Employees Int'l v. NLRB, 353 U.S. 313 (1957), the Board received a complaint against a labor union which was acting as an employer, and the Board's consideration of the complaint led it to consider the legal question whether it could lawfully exempt labor unions as a class, when acting as employers, from the requirements of the National Labor Relations Act. The Board then decided that legal issue affirmatively and dismissed the complaint on the basis of that legal determination. But obviously the Board was not required to decide that legal issue; as the Commission's memorandum concedes, the Board could have "declined" to take action

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1/ Mem. p. 5.

for entirely different reasons and thus avoided the legal issue entirely.[1/] On the other hand, when it chose, in its discretion, to decide the legal issue, its action became subject to judicial review.

Similarly, in McGrath v. Kristensen, 340 U.S. 162 (1950), a statute provided that the Attorney General "may" in his discretion suspend deportation proceedings against particular aliens, and a question arose as to whether a particular alien was legally eligible for such suspension. At that point the Attorney General could have made a discretionary decision that the alien was undesirable and that his deportation proceedings should not be suspended -- in which case the Attorney General would not have been required to decide the legal question of eligibility. But the Attorney General did reach and decide the legal question of eligibility, and his legal decision on that issue then became subject to judicial review. Again, in Pollak v. Public Utilities Commission, 89 App. D.C. 94, 191 F.2d 450 (D.C. Cir. 1951), rev'd other grounds, 343 U.S. 451 (1952), the D.C. Public

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1/ The Commission memorandum concedes that the Board was free, "on an individual basis", to decline to assert jurisdiction over such unions -- i.e., that it was free not to decide the legal question of the power of the Board to exempt such unions as a class (Mem. p. 7).

Utilities Commission could have decided on discretionary grounds not to respond to complaints against the bus companies, and could thus have avoided decision on any legal issue, but when it decided on legal grounds not to take action against the bus companies, those legal grounds became subject to judicial review. As the Commission's latest memorandum apparently recognizes, recent support for the same principles is found in Red Lion Broadcasting Co. v. FCC, 127 App. D.C. 129, 381 F.2d 908 (D.C. Cir. 1967), aff'd 395 U.S. 367 (1969) and Banzhaf v. FCC, 132 App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied __ U.S.___ (1969).[1/] The fact is that whenever an agency has discretion as to whether or not to act upon an alleged grievance, it is always free to dispose of the matter without deciding any issues of law (i.e., by denying relief on discretionary grounds), but its freedom not to decide such legal issues does not foreclose

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1/ The Commission's Supplementary Memorandum acknowledges that in Red Lion Broadcasting and Banzhaf the agency had made a "substantive legal determination" (Mem. p. 7), even though it was not required by law to do so, and that that legal determination was held to be "reviewable". There is no support in the cases for the Commission's effort to draw a distinction between the "substantive legal determinations", which it concedes to be reviewable, and the type of legal determination which was the apparent basis of the agency action involved in this case.

judicial review of any legal determinations which the agency does in fact make.[1/]

Moreover, it is reasonably clear that counsel for the Commission have not thought through the implications of their argument, even as applied to their own agency. Consider, for example, the consequences if the SEC had agreed with petitioner's interpretation of the Proxy Rules, rather than Dow's. In the first place, if the Commission had done so and advised Dow to that effect, its legal decision would clearly have been subject to judicial review at Dow's instance under Red Lion,

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1/ Schilling v. Rogers, 363 U.S. 666 (1960), upon which the Commission so heavily relies, is not inconsistent in any way. In that case, the question decided by the agency involved a mixture of discretionary and legal elements, and the Supreme Court concluded as a practical matter that there was no intelligible basis for segregating these elements; indeed, the Court was not even clear as to what issues the petitioner considered to be reviewable. 363 U.S. at 675. In this respect, as commentators have observed, the case simply illustrates that such segregation can sometimes be difficult. Saferstein, "Non-reviewability: Functional Analysis of 'Committed to Agency Discretion'", 82 Harv. L. Rev. 367, 381 (1968). In the instant case there is presented a clearly delineated legal issue apparently unencumbered by discretionary elements. Even more importantly, the Supreme Court in Schilling concluded, from the structure of the statute, that Congress did not want the administrator's decisions to be subject to any degree of judicial review, whereas in the instant case Congress has explicitly provided for such review.

even though the Commission could have avoided the issue entirely -- a point which has repeatedly been made by petitioner and which the Commission has declined to meet (see Petitioner's Reply Brief, p. 37). Secondly, once having decided the legal issue against Dow, the Commission could have taken any one of three additional steps: (1) it could, in its discretion, have instituted a new administrative proceeding looking toward a declaratory ruling on the question whether Dow's rejection of petitioner's proposal constituted a violation of the Proxy Rules;[1/] (2) it could, in its discretion, have instituted a new administrative proceeding looking toward the suspension of the registration of Dow's securities because of the proxy violation alleged by petitioner;[2/] or (3) it could, in its discretion, have filed an equity suit seeking to enjoin Dow from rejecting petitioner's proposal.[3/] We think it undisputable -- and that the Commission does not

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1/ 5 U.S.C. Section 554(a) and (e); 15 U.S.C. Section 78s(a)(2); see North American Resources Corp., Sec. Ex. Act Rel. 5756, 38 SEC 559 (1958); Consolidated Virginia Mining Co., Sec. Ex. Act Rel. 6192, 39 SEC 705 (1960).

2/ 15 U.S.C. Section 78s(a)(2).

3/ 15 U.S.C. Section 78u(e).

dispute -- that if the Commission had decided, in its discretion, to take either step (1) or step (2) above, any legal determination made by the Commission in any such new proceeding would have been subject to judicial review under Section 25(a) of the Securities Exchange Act, despite the fact that the Commission was legally free to choose, in its discretion, not to commence the proceeding and make the resulting ruling.[1/] In short, the "key to reviewability" suggested in the Commission's Supplementary Memorandum (p. 4) does not withstand analysis.

4. The Appropriateness of a "Hearing"

The Commission's Supplementary Memorandum now suggests, for the first time, that the only kind of administrative action that is reviewable is a "definitive" action taken pursuant to a statute or regulation providing that, if any issues of fact are involved, an evidentiary "hearing" must be held (Mem. p. 8). The argument is

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1/ In view of the position taken in the Commission's main brief, in which the Commission concedes that a formal "declaratory ruling" would constitute "reviewable final agency action" (pp. 32-37), we feel sure that the Commission will not take issue with the proposition stated in the text.

defective for a number of reasons. First, at least ten different provisions of the Securities Exchange Act call for the holding of a "hearing", but Section 25(a) of the statute does not speak in those terms; it requires judicial review following a "proceeding". Moreover, the argument is inconsistent with the accepted "pragmatic" approach under which the courts look to the substance of what happened below, rather than to form. As pointed out by the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 373 (1969), where an administrative agency has the power (as does the SEC[1/]) to institute a full-fledged "adjudicatory" proceeding looking toward the issuance of a declaratory ruling on an issue of law, the fact that the agency reaches a decision on the legal issue through a more expeditious procedure does not defeat appellate jurisdiction; such a legal determination is reviewable to the same extent as the same decision made as a result of full "adjudication".

The point is illustrated by the hypothesis discussed at pp. 12-13, supra -- i.e., that if the Commission

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1/ See p. 13, supra.

below had decided the legal issue in favor of petitioner and against Dow, that determination would have been subject to judicial review in accordance with Red Lion, whether or not the Proxy Rules contemplate an evidentiary hearing on issues of fact. And if Dow could have obtained judicial review of an adverse decision in the proceedings below, obviously petitioner can do the same. Any other result would in effect bring about a resurrection of the "negative order" doctrine long ago rejected by the Supreme Court in Rochester Telephone Corp. v. U.S., 307 U.S. 125 (1939), and by the Administrative Procedure Act, 5 U.S.C. Sections 551(10)(B) and (11)(C).[1/]

5. The Commission's "Informal Advisory" Function

The clear implication of the Commission's final argument is that, since the agency "issues thousands of

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1/ The Commission now reasons that the Supreme Court's 1938 decision in FPC v. Metropolitan Edison Co., 304 U.S. 375 (1938), must have "current vitality" for the purposes of this case, simply because it has been cited in subsequent FPC cases. But a review of the FPC cases cited by the Commission (Mem. pp. 8-9 and p. 9, n.8) demonstrates that each case involved difficult factual issues and that judicial review was refused because an adequate record had not yet been developed below and the factual issues were not yet ripe for review. Obviously those holdings do not militateagainst review here, where an agency has finally resolved a purely legal issue.

informal opinions" each year, an assertion of appellate jurisdiction in this case will impede the functioning of the agency and lead to a flood of cases in the Federal courts of appeals.

It may be observed as a general matter, as this Court itself has noted, that such dire administrative predictions "are rarely borne out".[1/] But more importantly, the Commission's own factual assertions in its Supplementary Memorandum demonstrate that its apparent fears are not well founded.

According to the Commission, the SEC receives requests for, and gives, "thousands of informal opinions" each year, but these requests "usually" seek advice as to whether "a person is free to sell shares without registering them under the Securities Act" (Mem. p. 10). By definition none of these "usual" submissions to the Commission involves

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1/ Office of Communication of the United Church of Christ v. FCC, 123 App. D.C. 328, 340, 359 F.2d 994, 1006 (1966); see also Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 617 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

a shareholder-management dispute under the Proxy Rules; none of these "persons" is required to appear before the Commission; and none of them is required to comply with the "formal procedures" which controlled the conduct of the parties in this case. Thus the Commission's memorandum makes clear that the majority of the "thousands" of its informal opinions are, and will remain, immune from judicial review.

Secondly, according to the Commission's memorandum (p. 10), it is only "on occasion" that the agency gives informal advice with respect to matters other than the sale of shares, and it is safe to assume that less than all of those "occasional" situations involve shareholder-management disputes under the Proxy Rules. The latter disputes are apparently quite rare.

Thirdly, even the rare shareholder-management proxy dispute is not subject to judicial review under Section 25(a) unless the five-man Commission itself takes action, and the Commission says that such disputes are only "sometimes reviewed by the Commission" (id.).

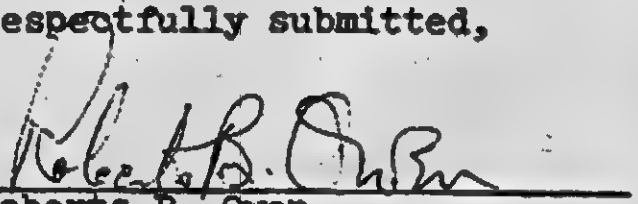
And in those few disputes in which the Commission itself takes action, it is safe to assume that the losing party will usually accept the Commission's decision without taking the time and trouble to take the matter to court.

In short, according to the factual picture presented by the Commission itself, a case of the kind involved here will very rarely be submitted to a court of appeals. Such a case can arise only where three conditions simultaneously exist -- that is, (1) where the SEC itself has required two adversaries to present their dispute to the agency, (2) where the five-man Commission has chosen, in its discretion, to review the problem personally (rather than leaving the matter to its staff) and (3) where the losing party is sufficiently concerned by the Commission's action to seek judicial relief. Since all three elements will rarely exist in the same case, a flood of litigation is hardly to be anticipated. And since such rare Commission rulings on the meaning of the Proxy Rules necessarily have a broad impact on corporate shareholders throughout the country, judicial review of such infrequent rulings is essential in order to provide the shareholder protection contemplated by the Securities Exchange Act.

CONCLUSION

One of the principal responsibilities of the SEC under the Securities Exchange Act is to protect shareholders in their relations with corporate management. In the instant controversy between a shareholder and management as to the proper interpretation of the Proxy Rules, the SEC required the parties to bring their dispute before the agency, and the agency then gave its imprimatur to the legal position of management. That final administrative decision has far-reaching implications both for the shareholders of the particular company and for corporate shareholders generally, and only this Court can now grant effective relief. Under the governing statute the Court has a duty to take jurisdiction and decide the legal issue presented on the merits.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF
THE SECURITIES AND EXCHANGE COMMISSION

REPLY BRIEF OF PETITIONER

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January 5, 1970

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No. 23,105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

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REPLY BRIEF OF PETITIONER

I. THE POSTURE OF THE CASE ON THE MERITS

This case, as presented by the parties' main briefs, is in an extraordinary posture.

When petitioner sought review by this Court of the action of the Securities and Exchange Commission

below, the Commission promptly moved to dismiss the petition for review, alleging that the Court was without jurisdiction, and on October 13, 1969, after full briefing and argument, the motion was denied "without prejudice to renewal thereof in the briefs and at the argument on the merits." Yet when it filed its main brief on the merits, the Commission declined "to express . . . any view" on the substantive issue presented on this appeal. According to its brief (p. 2), the Commission has told its counsel that it may not speak to the merits at all.

There is clear authority for the proposition that this refusal of the appellee to present its position on the merits may be "tantamount to a confession of error". As at least one Court of Appeals has recognized, "an appellee who does not intend to confess error" has an obligation to provide the court "with any argument which can conscientiously be made with regard to all substantial points presented on appeal, notwithstanding the confidence it may have" in its other positions -- and this principle is as applicable to the Federal Government as an appellee as it is to any other party. Hungerford v. United States, 307 F.2d 99, 102 (9th Cir. 1962). (Emphasis supplied.)

In view of the Commission's extraordinary refusal to discuss the merits, this reply brief will of necessity be confined to the question of the jurisdiction of this Court to review the action of the Commission below. It is respectfully submitted that in considering this jurisdictional question both the Court and the petitioner are entitled to assume, throughout the rest of this proceeding, that the legal interpretation of the Proxy Rules presented in petitioner's main brief on the merits is correct and that any contrary action taken by the Commission below was erroneous as a matter of law.

II. THE JURISDICTIONAL FACTS

A. The Proceedings Below

In view of the position taken by the respondent on the merits, the sole matter now in dispute between the parties in this case is the applicability, in the present circumstances, of Section 25(a) of the Securities Exchange Act, 15 U.S.C. § 78y(a), which provides in relevant part as follows:

> "Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in . . . the United States Court of Appeals for the

> District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition [for review]." (Emphasis supplied.)

As further demonstrated below, no court has ever discussed the applicability of the above-quoted language to a Commission resolution of a shareholder-management dispute as to the content of management's proxy materials.[1/] Since the statute has not been judicially interpreted in any way which is directly relevant here, the basic question before the Court is necessarily the question whether, before the instant appeal was filed, there had taken place a "proceeding", within the ordinary meaning of that term, to which the Medical Committee was a party and which resulted in a Commission decision by which the Medical Committee was aggrieved.

Petitioner contends, of course, that there was such a proceeding. The operative facts have been set forth in petitioner's main brief (under the heading "The Proceedings Below", pp. 8-12), and petitioner will not repeat the detailed facts here. In summary, however, the situation is this: (1) a legal controversy arose between petitioner, a shareholder of Dow Chemical Company, and the management

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1/ See p. 16-17, infra.

of Dow as to whether Dow was legally entitled, under SEC Proxy Rules 14a-8(c)(2) and (5), to reject a proposal proffered by the Medical Committee for inclusion in Dow's proxy materials; (2) upon management's rejection of the proposal, the Proxy Rules expressly required the parties, pursuant to the Commission's own "formal procedures", to submit their controversy to the Commission so that it could "consider the problems involved"; (3) consistent with the requirements of the Proxy Rules the parties then presented to the SEC opposing legal briefs on the legal issue between them (i.e., the applicability of Rules 14a-8(c)(2) and (5) to the Medical Committee's proposal); (4) under the Commission's own procedural mandate "the burden" was upon Dow to justify its rejection of the Medical Committee's proposal; (5) the staff of the Commission (specifically, the Division of Corporation Finance) rendered a tentative decision that for the reasons stated by Dow's counsel Dow was justified, "pursuant to Rules 14a-8(c)(2) and 14a-8(c)(5) under the Securities Exchange Act of 1934", in omitting the Medical Committee's proposal from management's proxy material (R. 20a); and (5) the Commission itself then "approved" the action taken by the Division

of Corporation Finance (R. 44a-45a).[1/]

It should be noted, as the Commission emphasizes in its brief, that, although the parties were required by the Commission's rules to bring their dispute before the agency, the five-man Commission itself was not legally obliged to take any position, one way or the other, as to the merits of the issue involved. As demonstrated below, however, the Commission in this case did take a position; it endorsed the view of its staff that Proxy Rules 14a-8(c)(2) and (5) gave Dow the legal right to exclude the Medical Committee's proposal from management's proxy materials. In this case, in other words, there was a final administrative decision that Dow's legal arguments were right and that the Medical Committee's were wrong as a matter of law. Thus the Commission gave its official imprimatur to the legal position of Dow's management in the continuing controversy between management and the Medical Committee.

1/ Although the Commission's brief recognizes in a footnote that the staff's action was based upon the opinion of Dow's counsel (Br. p. 6), the brief refrains from mentioning that the record contains a formal minute of the Commission itself indicating that the Commission adopted "the recommendation of the Division of Corporation Finance contained in two memoranda dated March 18, 1969 . . .." (R. 46a) It is thus not entirely accurate for the Commission's brief to say, as it does, that when the Commission acted below, it "expressed no view concerning the legal issues" in dispute between the Medical Committee and Dow (Br. p. 2).

B. The Grounds of the Commission's Action Below

When the Commission wrote into its Proxy Rules the requirement that, whenever a corporate shareholder and corporate management get into a dispute as to whether a specific shareholder proposal must be included in management's proxy materials, the dispute must be brought before the Commission, the agency's purpose was to give it an opportunity to decide whether to take action to compel management to include the proposal in the proxy materials. Faced with such a dispute, the agency may of course decide to take no action, and there are obviously a number of grounds upon which such a decision can be based. For example, the agency may decide that, whatever the merits of the controversy, the agency lacks funds or personnel to take action against the company and that no action should be taken on that ground alone. Again, it may decide that the shareholder's position rests upon factual propositions which do not appear to be true and that the agency should not act for that reason. Or the agency may decide that, although it has the resources to take action, and although the facts are not in dispute, the Proxy Rules, as interpreted by the Commission, do not require management to accept the

particular shareholder proposal involved and that no action should be taken against the company on that ground.

In this case the Medical Committee has repeatedly contended, without any denial by the Commission itself, that when the Commission here decided to act, and rendered a decision in favor of Dow and against the Medical Committee, it did so because it interpreted its own Proxy Rules (Rules 14a-8(c)(2) and (5)) as authorizing management to exclude from its proxy materials a proposal of the kind submitted by the Medical Committee. The factual basis of the Medical Committee's allegation that the Commission acted on such legal grounds was (a) that Dow's refusal to include the Medical Committee's proposal was expressly based on Dow's interpretation of Rules 14a-8(c)(2) and (5) (R. 9a-12a; R. 18a-19a; R. 23a; R. 34a-35a), (b) that the SEC's Division of Corporation Finance expressly adopted the same legal interpretation of the same rules (R. 20a), and (c) that the Commission itself expressly adopted the position of the Division. (R. 44a-46a).

As noted, the Commission in this case has never denied the Medical Committee's allegation as to the grounds of the Commission's action. Although it would be a simple

matter for the Commission to deny the allegation were it untrue, and although the Medical Committee has repeatedly emphasized the absence of such a denial, the Commission in this case has doggedly refused either to confirm or to deny.[1/] Even though the Commission itself is obviously fully aware of the reasons for its decision, its briefs carefully avoid the issue -- and, indeed, Commission counsel has chided the Medical Committee for what is described as "inappropriate speculation" as to the ground of the Commission's action below. (Br. p. 34).

As will be further indicated below, the exact ground of the Commission's action does not affect this Court's jurisdiction (although it has some bearing upon the proper scope of review). On the other hand, to the extent that that ground is relevant, the Commission's extraordinary reluctance to say what it did, and its careful avoidance of a denial of the Medical Committee's allegation,

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1/ This is what the Commission's brief says as to the grounds of its decision below: (1) it says that the Commission "expressed no view concerning the legal issues" (p. 2), which is not entirely accurate (see page 6, n.1 supra); (2) it says that the minute of the Commission's action "does not set forth the reasons" for the Commission's "determination" (p. 33); and (3) it says that "even if it were assumed that the Commission, in the manner suggested by [petitioner], has rendered an interpretation of its Proxy Rules", that interpretation was too informal to warrant judicial review (p. 34). (Emphasis supplied.)

can only be regarded as a "demurrer": What the Commission is really saying is, "Even if our action below was based solely on a legal decision as to the proper legal interpretation of Proxy Rules 14a-8(c)(2) and (5), and even if our legal interpretation of those rules is wrong as a matter of law, this Court is without jurisdiction to review what we have done." Given this demurrer we respectfully submit that the Court must assume, for the purposes of its consideration of the jurisdictional issue, that the Commission's decision below was a pure decision of law and that that decision was legally erroneous.

III. JURISDICTIONAL ARGUMENT

A. Respondent's Initial Argument (As to the Timeliness of the Filing of this Appeal) Is Frivolous and Has Been Effectively Waived

When the Commission filed its main brief in support of its motion to dismiss the instant appeal, it noted that the Commission's decision below was actually made on March 24, 1969, and that the Medical Committee's petition for review was filed 66 days thereafter, on May 29, 1969. But the Commission's earlier briefs also recognized that the first time that the Medical Committee was officially notified of the Commission's decision was by a Commission letter dated

April 2, 1969 (R. 44a) and that the Medical Committee commenced this appeal within 60 days after that notice. For that reason the Commission expressly refrained from reliance upon any argument of untimeliness.[1] At no time in its briefing of its motion to dismiss (and it filed three separate memoranda in support of that motion), did the Commission ever suggest that it was relying on some earlier unofficial notice to the Medical Committee (before the official notice of April 2, 1969) as the basis for an untimeliness argument -- and petitioner and the Court were allowed to go forward with the case and expend many hours of work on the dual assumptions (a) that the only notice which the Commission considered relevant to its jurisdictional argument was the Commission's official notice letter of April 2, 1969, and (b) that the Commission was not "urging" any untimeliness argument at all.

Now, however, almost six months after the Commission filed its jurisdictional motion in this Court, the Commission

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1/ The Commission's memorandum in support of its motion to dismiss this appeal suggested that the Court "may" be without jurisdiction because 66 days elapsed between the Commission's decision and the filing of the petition for review, but the memorandum expressly stated that the Commission would "not urge" dismissal on that ground because "the Commission's staff did not advise the Medical Committee of the Commission's . . . decision . . . until April 2" (Mem. p. 5, n.2).

has suggested for the first time that on March 24, 1969, the day of the Commission's decision, one of its lawyers telephoned a lawyer who was then acting for the Medical Committee and that that telephone call legally started the time for appeal running, rendering this appeal untimely by a matter of six days.

This after-thought suggestion is completely unacceptable, both in substance and in the timing of its presentation, for the following reasons:

(1) The jurisdictional statute's allowance of a period of 60 days "after the entry of such order" for the filing of a petition for review was obviously designed to allow the petitioner that period of time for decision-making and work on its appeal, and it is equally obvious that that purpose can be served only if the date of "entry" closely corresponds with the date upon which the order becomes formally available to petitioner. In recognition of this fact administrative agencies generally have established rules as to when and how "entry" of an order, including its availability, shall be accomplished, and it has been squarely held that when an agency (specifically, the SEC) fails to comply with its own rules, that failure

constitutes a failure to make an "entry" of the order and indefinitely defers the commencement of the running of the statutory time period, despite the issuance of the order by the agency. Lile v. SEC, 324 F.2d 772 (9th Cir. 1963).[1/] For that reason the date of the Commission's actual decision (March 24, 1969) is not the only operative fact in determining the timeliness of this appeal; the significant question is, when did the order itself become formally available to the interested parties so as to give rise to an "entry" within the meaning of the statute and the Commission's rules?

1/ At the time of the Lile decision the rules of the SEC required the agency to maintain "a docket of all proceedings" in order formally to inform the public and interested parties as to actions taken by the Commission. In the Lile case the Commission issued its order on July 9, 1962, and mailed the order to petitioner the next day, but it failed to record the order in its "docket". The Commission argued, as it does here, "that the date of issuance of the order, July 9, 1962, should be deemed to be the date of 'entry' within the meaning of § 25(a) of the Act" (324 F.2d at 773), but the Court of Appeals rejected the argument, saying "there is nothing in the record here to show that the order in question has ever been placed or recorded or summarized in any public record so as to serve as notice" of the existence of the order. The court squarely held that neither the issuance of the order nor the Commission's letter to the petitioner constituted an "entry" of the order within the meaning of the statute here involved and that, in the absence of proper docketing, no "entry" of the order had ever occurred. (Id.) Following the Lile decision the Commission's rules of practice were amended to eliminate the docketing requirement, but the Commission substituted instead (as noted below in the text) a requirement that the Commission make every order available, either to the public or to the interested parties.

(2) In its brief the Commission cites Rule 22(k) of the Commission's Rules of Practice with respect to the date of the "entry" of an order, but it fails to mention that the Rule requires that all Commission orders be made immediately available, either to the public or at least to interested parties.[1/] Obviously the purpose of the rule was to ensure that the formal time for the taking of an appeal and the actual time available to an aggrieved party would correspond. But the fact is that in this case the Commission's order was not made immediately available to the Medical Committee. Indeed, when the Medical Committee requested a copy of the Commission's decision (i.e., the minute which reflected that decision), the Commission made no response for four weeks and only then released the minute, grudgingly, to the Medical Committee.[2/] Under the doctrine of the Lile case, since the Commission has violated its own

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1/ See 17 C.F.R. 201.22(k).

2/ When the Solicitor of the SEC received the Medical Committee's request for a copy of the minute reflecting the Commission's decision, he recognized that the minute was unavailable under the Commission's own rules (see 17 C.F.R. § 200.80(c)(5)) and for that reason felt obliged to ask the Commission for special authority to make the minute available to the Medical Committee. See letter from David Ferber, Solicitor of SEC, to Jeffrey Bouman, June 12, 1969.

rules with respect to making its order available, the time for appeal has even now not expired.

(3) It is really astonishing, in this day and age, that a Federal administrative agency would seriously suggest that for the purpose of an appeal to this Court a telephone call can start the statutory time period running; the necessity of formal availability of an appealable decision is so clear, for both practical and legal reasons, as to render the argument frivolous and irresponsible. It is quite apparent, moreover, that at the time the telephone call was made, the Commission itself did not regard that call as any sort of operative notice.[1/] The pure after-thought that this Court's jurisdiction might depend upon a telephone call -- a thought which occurred to the Commission six months after this case began -- is unworthy of this Court's consideration.

1/ A few days after the call supposedly occurred, counsel for the Commission wrote a formal letter (on April 2, 1969) to the then lawyer for the Medical Committee, stating that the Commission had made its decision, and it is clear both from the tone of the letter and from the absence of any reference to the supposed telephone call that Commission counsel regarded the letter as the operative notice (R. 44a).

B. The Commission Has Made No Showing that the Language of the Jurisdictional Statute -- Which Reads Squarely on the Facts of this Case -- Does Not Authorize Review by this Court

The Commission's brief suggests, somewhat indirectly, that there are two decisions of the Court of Appeals for the Second Circuit in which that Court considered and decided the jurisdictional issue presented here. Leighton v. SEC, C.A. 2, No. 26,458, November 3, 1960, cert. denied, 365 U.S. 888 (1961); Peck v. SEC, C.A. 2, No. 22,289, April 7, 1952. The suggestion is wholly inaccurate. In Leighton the petitioner was asking for judicial review before any administrative decision, final or otherwise, had been made, either by the Commission or its staff, and in those circumstances it is not surprising that the Court dismissed the petition for review without opinion.[1/] In Peck the petitioner (unlike

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1/ Specifically, when that shareholder-management dispute (which did not involve a shareholder proposal for the proxy materials) was brought before the agency, the only administrative action taken in the matter was the writing of a staff letter saying that "We will give the matter our careful consideration and will take any action which seems appropriate under the circumstances". (See letter of July 26, 1960 from Harvey A. Thorson, Assistant Director, Division of Corporation Finance, Securities Exchange Commission, to William Leighton, attached to Petition to Review, C.A. 2, No. 26,458 (November 3, 1960). Obviously Leighton's effort to "appeal" from that letter was wholly inappropriate.

the Medical Committee here) was not "seeking review of the merits of the Commission's interpretation [of its Proxy Rules]",[1] and the dismissal of the petition without opinion is clearly not authority for dismissal of the petitioner here. Since the parties and this Court therefore approach the statutory issue in this case without direct aid from any previous judicial interpretation of this statute, the essential issue here (as noted above) is whether, within the ordinary meaning of the statutory words, there was a "proceeding" below to which petitioner was a party and which resulted in a Commission decision by which petitioner was aggrieved.

Quite obviously there was. The "formal procedures" established by the Commission itself[2] require that the type of shareholder-management dispute here involved must be brought before the Commission for its "consideration"[3]; the issues between the parties must be explained to the Commission[4]; the submissions made by management to the Commission must be served upon the shareholder[5]; and management must bear the "burden of proof"[6]. In the

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1/ See the brief filed by Commission counsel in that case, which expressly states that "[w]e do not construe the petition as seeking review of the merits of the Commission's interpretation in the proxy dispute . . . ." Brief of Respondent in support of Motion to Dismiss Petition for Review C.A. 2, No. 22,289, March 31, 1952.

2/ 17 C.F.R. § 202.1(a), (b), and (c). See also brief for Petitioner here describing proceedings below (pp. 8-12).

3/ 19 Fed. Reg. 246, SEC Ex. Act Rel. No. 4979 (1954).

4/ 17 C.F.R. § 240.14a-8(d).

5/ Id.

6/ 19 Fed. Reg. 246, SEC Ex. Act Rel. No. 4979 (1954).

instant case the controversy between the Medical Committee and Dow centered upon a pure question of law, with no issues of fact involved; the parties, consistent with the command of the Commission, submitted opposing legal briefs with service on the other party; the staff of the Commission made a tentative decision of law as to the applicability of Proxy Rules 14a-8(c)(2) and (5); and the Commission endorsed the staff's position, thereby entering a final decision in favor of Dow and against the Medical Committee. In short, what transpired below was an adversary proceeding -- a "formal" one, according to the Commission itself[1/] -- which was in substance identical, procedurally, to summary judgment proceedings in a Federal District Court and which produced a final administrative decision as between the two opposing parties. These uncontroverted facts establish, we think beyond genuine dispute, that this Court has the right and duty to take jurisdiction under the plain language of Section 25(a) of the Securities Exchange Act.

Given these facts it is not altogether surprising that the Commission's brief pays little attention to the language of the statute and attempts to build an argument around some 60 judicial decisions involving general principles of administrative law. In some respects, however, the Commission's approach has the effect of reading into the statute words that it does not contain. For example, the Commission

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1/ See 17 C.F.R. § 202.1(a), (b), and (c).

takes the position that when the Congress referred to "an order," unembellished with adjectives, it meant "a judicial order," and that when the Congress referred to "a proceeding," it really meant a "an adjudicatory proceeding" (Br. pp. 10-12). (Emphasis supplied.) To support this approach the Commission invokes, not the words of the statute or its legislative history, but (a) two judicial decisions involving different factual situations[1/] and (b) a lengthy and innocuous description of various provisions of the Securities Exchange Act and the Proxy Rules (Br. pp. 12-22). Neither of these discussions helps respondent's position.

Turning to the two judicial decisions, it is true that in this Court's American Sumatra decision of 1937,[2/] it described the instant jurisdictional statute as providing for review of "judicial orders of the Commission". But a quick review of the language of that opinion demonstrates that in referring to a "judicial order", the Court was referring to precisely the type of order entered in this proceeding. Thus, immediately after the Court's reference to "judicial orders", the Court explained what it meant by that term:

1/ See the discussion of American Sumatra and Metropolitan Edison at pp. 11-12 of the Commission's brief.

2/ American Sumatra Tobacco Corp v. SEC, 68 App. D.C. 77, 93 F.2d 236 (1937).

> "We are not concerned here with an administrative ruling such as was made in Third Ave. Ry. Co. v. Securities and Exchange Commission (C.C.A.) 85 F. (2d.) 914 [which involved a request for rule-making], but with action which operates particularly rather than generally -- with a judgment entered on a state of facts and affecting only one person. Such a judgment satisfies the requirement of the Act so far as review is concerned, that there be (a) a proceeding under the Act, (b) to which the petitioner was a party, (c) and that he be aggrieved by the order of the Commission." 68 App. D.C. at 80, 93 F.2d at 239 (Emphasis supplied).

In other words, this Court was indicating by dictum that a legislative or rule-making order "which operates generally", rather than "particularly", may not be reviewable under the statute, but at the same time the Court was squarely holding that an administrative action which, like a judgment, "operates particularly" in a controversy between individuals is reviewable. If anything, American Sumatra supports review in this case.[1/]

1/ Since American Sumatra held that the Commission order involved in that case was reviewable under the statute here involved, the Court's holding can hardly help the Commission here. To the extent that the opinion contains language suggesting that an evidentiary hearing might be a prerequisite to judicial review (and we do not think the court was so stating), such language has no bearing here, for the following reasons:

(1) In the dispute between the Medical Committee and Dow below there were no issues of fact, and it would make no sense to say that a useless "evidentiary hearing" below was a prerequisite to appellate jurisdiction in this case.

(footnote continued)

Immediately after its discussion of American Sumatra, the Commission's brief quotes language from the Supreme Court's 1938 decision in FPC v. Metropolitan Edison Co., 304 U.S. 375, 384 (Br. pp. 11-12) and on that basis implies (although it does not expressly state) that under the judicial review provisions here involved an administrative "hearing upon evidence and supported by findings" of fact is a prerequisite to review by this Court. But as petitioner pointed out in its earlier brief in this Court, in a comment which the Commission has decided to ignore, the leading commentators in the field of administrative law have correctly observed that the Metropolitan Edison decision represents an outmoded theory and has not been followed in subsequent decisions under the same review provisions. Jaffe, Judicial Control of Administrative Action, 419 (1965). Indeed, the subsequent cases reviewing

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(2) An evidentiary hearing actually took place in American Sumatra, so that the Court there was not called upon to decide whether it would have had jurisdiction if there had been no hearing, and anything said about jurisdiction in the absence of a hearing would necessarily be dictum.

(3) A series of far more recent decisions decided under a statute whose language is for present purposes identical to Section 25(a) of the Securities Exchange Act makes plain that an evidentiary hearing is not a prerequisite to review under the statutory language here involved. See our subsequent discussion of Sun Oil Co. v. FPC, 266 F.2d 222 (5th Cir. 1959), aff'd, 364 U.S. 170 (1960), and related cases (p. 22, infra).

FPC action -- under a review provision whose language is substantially identical to the review provision involved here[1/] -- squarely hold that, where no issues of fact are involved, a useless evidentiary hearing is not a prerequisite to jurisdiction under the statutory language. Cities Service Gas Co. v. FPC, 255 F.2d 860 (10th Cir. 1958), cert. denied 358 U.S. 837 (1958); Phillips Petroleum Co. v. FPC, 227 F.2d 470 (10th Cir. 1955), cert. denied, 350 U.S. 1005 (1956); Sun Oil Co. v. FPC, 266 F.2d 222 (5th Cir. 1959), aff'd, 364 U.S. 170 (1960).[2/]

Since it has thus been squarely held that statutory language identical to that of Section 25(a) of the Securities Exchange Act does not require an evidentiary hearing by the administrative agency as a prerequisite to judicial review, we are unclear as to what

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1/ Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), provides that "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . ." (Emphasis supplied.)

2/ As the Court of Appeals for the Fifth Circuit stated in Sun Oil, supra,

> "We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented." 266 F.2d at 226.

See also Dyestuffs and Chemicals, Inc. v. Flemming, 271 F.2d 281, 286 (8th Cir. 1959), cert. denied 362 U.S. 911 (1960).

comfort the Commission derives from its repeated assertion that the administrative proceedings involved in this case were not "adjudicatory".[1/] Since the statute does not require an "adjudicatory proceeding", what difference does it make whether or not that label is appropriate in describing the proceeding below?

Moreover, in its effort to show that the proceedings below were not "adjudicatory", the Commission has gone to quite extraordinary lengths to exalt form -- or labels -- over substance. Although the Commission admits that the Proxy Rules require the parties to a shareholder-management dispute of this kind to bring their controversy before the Commission, and although the Commission admits that management carries the "burden of proof" in the proceedings that then ensue,[2/] the Commission

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1/ Petitioner was surprised to read, in the Commission's brief, that the petitioner itself has made the "assertion" that the "formal procedures" required by the Commission are "adjudicatory procedures" (Br. p. 13), implying that the petitioner has conceded that, if the proceedings below were not "adjudicatory", this Court is without jurisdiction. Petitioner has never made such an "assertion" or such a concession.

2/ See supra p. 17. The Commission tries to brush aside this burden of proof" (a clear indication of an adversary proceeding) in two ways. First, it says that when the Commission placed the burden of proof upon management, it did not expressly say that it was placing that burden upon management for the purposes of something which it simultaneously characterized as "an administrative proceeding" (Br. p. 17) -- a comment which seems to us completely beside the point. Secondly, the Commission suggests that, even if the Commission had not placed the burden of proof upon management, as a matter of law

(footnote continued)

insists that the proceeding cannot be regarded as truly "adversary" because (for example) the Commission's rule as to service of papers (requiring management to send to the shareholder copies of the materials which management must submit to the Commission) "avoids the term 'serve'" in favor of the term "shall forward" (Br. pp. 16-17). It is hard to imagine a clearer case of allowing labels to obscure reality. Again, the Commission insists that what happened below was all terribly "informal", lacking in "formality", and done purely as a matter of "courtesy" on the part of the Commission (see Br. pp. 19, 34, 36), but this is hardly a candid characterization of what happened below. The Commission itself has promulgated "formal procedures" for the handling of such disputes, making it mandatory that the parties present themselves before the Commission, and a "formal", adversary, administrative "proceeding" then took place, leading to a final administrative decision by which the responsible regulatory agency gave its formal imprimatur to the legal theories of one party to the dispute and rejected the legal position of the other. Since that decision was evidently a pure decision of law, it is entirely appropriate for this Court to take jurisdiction and determine whether the administrative legal decision was correct.

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management would have borne the burden anyway "in an injunction proceeding brought either by the Commission or by the shareholder" (Br. p. 17). This assertion is made without any supporting authority; it is of extremely doubtful validity; and, again, it is beside the point. The simple fact is that the Commission itself placed the burden of proof upon management in the head-to-head adversary proceedings which took place below.

C. Contrary to the Commission's Argument, Review by this Court Will Not Interfere with Any Discretionary Function of the Commission

This case involves a familiar situation in the context of administrative law. A statute has conferred upon an administrative agency the responsibility for regulation of a particular industry, and it has authorized the agency to take certain types of action against industry members if such relief is necessary to protect particular members of the public. Specifically, the Securities Exchange Act here has authorized the SEC to act in aid of the specially protected shareholder class[1/] in order to prevent corporate managements from depriving shareholders of their rights to be heard under the Proxy Rules, and the agency itself has established formal procedures in order to bring specific shareholder-management disputes before the agency and thus to afford the agency an opportunity to decide whether or not to act in aid of the shareholder.

The main argument advanced by the Commission in its brief is that agency decisions of this type -- i.e., agency decisions as to whether or not to act in aid of a particular member of the protected class -- are purely

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1/ See Section 14 (proxy solicitations) of the Exchange Act of 1934, 15 U.S.C. § 78n.

"discretionary" decisions which are completely immune from judicial review. The argument is wrong on both the facts and the law.

To begin with, the Commission's position obscures, by over-simplification, the fact that in the course of performing such a "discretionary function", the administrative agency may actually resolve a number of different types of issues -- for example, issues of law, issues of fact, or issues of "policy" -- and that the nature of the appropriate judicial review will depend on the nature of the particular type of issue involved. Great judicial deference is admittedly due to an agency decision which is in essence a policy or discretionary judgment; such a judgment, depending upon the particular case, is normally either not reviewable at all or is reviewable only to determine whether "an abuse of discretion" has occurred. See the discussion in Cappadora v. Celebrezze, 356 F.2d 1, 5-6 (2d Cir. 1966). On the other hand, where an agency has evidently made a decision on a pure issue of law (e.g., as to whether the agency has jurisdiction under the enabling statute, or whether the statute makes an applicant legally eligible for relief), the courts will normally review that legal

decision de novo (even though in a broad sense that legal decision was made by the agency while it was performing "a discretionary function"), and it is recognized that such review does not involve any interference with agency discretion. Perkins v. Elg, 307 U.S. 325, 350 (1939) (holding that judicial review of an administrator's legal decision, which was made in the course of "a discretionary function", "would in no way interfere with the exercise of the Secretary's discretion . . . but would simply preclude" action based upon an erroneous legal ground); McGrath v. Kristensen, 340 U.S. 162 (1950) (holding that a legal determination made by the Attorney General while performing a discretionary function is fully reviewable); I.C.C. v. Humboldt Steamship Corp., 224 U.S. 474, 484 (1912) (holding that where an administrative agency is engaged in a discretionary function but "refuses to act . . . from a misunderstanding of the law, it cannot be said to exercise discretion"). (Emphasis supplied.) Perhaps the clearest statement of what should be done by a reviewing court in such circumstances is the Supreme Court's famous statement in Rochester Telephone Corp. v. United States, 307 U.S. 125, 136 (1939), that upon review of an agency's performance of a discretionary function, "if the Commission was found to

have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles." (Emphasis supplied.)

For present purposes the application of this doctrine of so-called "partial reviewability" -- the doctrine that the courts should review administrative legal decisions in full but not discretionary decisions[1/] -- is well illustrated by the case of Office Employees Int'l Union v. NLRB, 98 D.C. App., 335, 235 F.2d 832 (D.C. Cir. 1956), rev'd, 353 U.S. 313 (1957), in which a member of a specially protected class (a labor union) applied to an administrative agency (the NLRB) for relief against a regulated "employer."

1/ See Schilling v. Rogers, 363 U.S. 666, 675 (1960), discussing McGrath v. Kristensen, supra. (The applicability of the Schilling case, upon which the Commission here relies, is discussed at a later point in this brief.) As demonstrated by both Humboldt and Perkins v. Elg, supra, the doctrine of partial reviewability came into being prior to the 1946 enactment of the Administrative Procedure Act, and as demonstrated by McGrath v. Kristensen, supra, and Schilling v. Rogers, supra, the enactment of the statute did not affect the existence of the doctrine. Indeed, as the Commission's brief carefully emphasizes (p. 30, n.37), the judicial review provisions of the Administrative Procedure Act were intended "to restate the existing law as to the area of reviewable agency action", which of course included the doctrine of partial reviewability. Section 10 of the Act precludes judicial review of agency decisions on issues which are "committed to agency discretion", but it clearly does not preclude review of agency decisions on legal issues which, by definition, are not "matters of discretion." See 5 U.S.C. 701(a)(2).

The agency's function -- the function of deciding whether to take action in aid of the union -- was a discretionary function precisely akin to the administrative function involved here. As here, the agency could have ignored the union's complaint entirely, or it could have decided to take no action on some "discretionary" ground (e.g., insufficient personnel to prosecute the particular case). What it did in fact was exactly what the Commission has done here: it refused to take action in aid of the union on the basis of an erroneous interpretation of the law.[1/] Having been denied the aid of the agency, the union sought judicial review in this Court. Although it might have been argued, as the Commission does here, that the Court should not review the agency's action because the matter "fell within the broad discretion" of the agency, this Court had no doubt as to its jurisdiction; the only question was the scope of review. See 98 D.C. App. at 336, 235 F.2d at 833.

On the latter issue the Office Employees case is particularly instructive. This Court held that, because the function of the NLRB was a discretionary one, the Court could review that decision only to determine

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1/ The agency erroneously interpreted the enabling statute as giving it the legal power to exempt an entire class of "employers" from the operation of the Act.

whether there had been an abuse of discretion (or whether the agency's action was "arbitrary or capricious") and that the Court could not inquire "further" into the controversy. 235 F.2d at 833. Finding no such abuse of discretion, the Court held for the agency.[1/] The matter was then appealed to the Supreme Court, however, and the Supreme Court reversed this Court's decision, pointing out that the Board had acted, not "within [its] discretion",

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1/ Apparently this Court took a similar view of the problem presented in Leighton v. SEC, 95 App. D.C. 217, 221 F.2d 91 (1955), cert. denied 350 U.S. 825 (1955). In that case a private citizen had asked the SEC to commence an investigation into the sale of travelers' checks; the Commission had refused; and this Court held that the matter was "within the discretion of the Commission" and not subject to full judicial review. 95 App. D.C. at 218.

In its brief the Commission argues that the briefs filed in the Leighton case reveal that one of the issues there decided by the Commission was a pure legal issue, albeit a legal issue which Commission counsel considered insubstantial. Whether this Court took the same view of the administrative proceedings below is unclear; it may simply have disregarded Leighton's legal contentions as being frivolous, which they quite obviously were. We do not read Leighton as suggesting that where the Commission's own rules bring about the commencement of a formal adversary proceeding, and where the Commission then reaches a final decision by deciding a substantial legal issue, that legal decision is immune from appellate review under Section 25(a) of the Securities Exchange Act. Moreover, if Leighton is so read, it is squarely inconsistent with Perkins v. Elg, ICC v. Humboldt, Office Employees, and related cases discussed herein.

but on the basis of an erroneous legal decision as to the scope of its own powers. 353 U.S. at 319, 320. The Supreme Court therefore felt free to review in full the legal question decided (erroneously) by the agency, and having written an opinion exposing the error, it then remanded the case "to the Board for further proceedings in accordance with this opinion." 353 U.S. at 320.[1/]

The action of the Supreme Court in Office Employees exposes a basic misconception in the Commission's line of argument here. The Commission repeatedly suggests that the Medical Committee here is "demanding" that the Court "direct" or "compel the Commission to exercise its discretion in an enforcement matter" (see, e.g., Br. pp. 27, 29, 32), and it cites several cases holding that

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1/ Office Employees and the line of cases previously discussed (Perkins v. Elg, etc.) demonstrate the error, through over-simplification, in the statement in the Commission's brief (p. 24) that "the exercise of administrative discretion to institute an action in court, initiate administrative proceedings or otherwise to take action to enforce the law is not a matter which may be properly reviewed by the courts." That depends on the nature of the issues decided by the agency. If the agency refuses to take action to enforce the law through "a misunderstanding of the law, it cannot be said to exercise discretion", and its refusal may properly be reviewed by the courts. ICC v. Humboldt Steamship Corp., supra at 484. Moreover, in none of the cases cited by the Commission (at Br. pp. 24-25) in support of the proposition quoted above, had the agency required the parties to appear before it in a proceeding of the kind involved here, and in none of those cases was judicial review sought under a direct-appellate-review statute of the instant kind.

such judicial compulsion would be impermissible.[1/] The answer is that if we were seeking such a compulsory order, our request might be improper, but that in fact we seek no such thing. We ask only for what the Supreme Court granted in Office Employees: (a) a review of the legal decision evidently made by the Commission, and (b), if that decision was legally erroneous, a remand to the Commission to take any further action it thinks appropriate in its discretion, so long as that action is not inconsistent with correct legal principles. If the Commission should then accept this Court's ruling of law, but should nevertheless decide not to proceed against Dow for some legitimate "discretionary" reason (e.g., a lack of funds or personnel), the Medical Committee would have no further cause for complaint against the Commission itself.[2/]

1/ See, for example, the Commission's heavy reliance upon Crooker v. SEC, 161 F.2d 944 (1st Cir. 1947) (Br. p. 24), and Curran v. Laird, C.A. D.C. No. 21040 decided by this Court on November 12, 1969 (Br. pp. 30-31). In both cases the petitioner was demanding a judicial order directing the Commission to exercise its discretion in a particular way (in Crooker, to issue a stop order, and in Curran, to "consider" specific facts in arriving at a discretionary judgment). As explained in the text, we make no such demand here.

2/ The possibility of such a result, of course, does not mean that the Medical Committee has not been aggrieved by

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The Commission has sought to avoid the impact of the doctrine of "partial reviewability" in this case by pointing out that there are a few situations in which it is inapplicable. For example, in Schilling v. Rogers, 363 U.S. 666 (1960), upon which the Commission heavily relies (Br. pp. 27-28, 30), the Supreme Court refused to review an administrative decision as to an individual's eligibility for certain benefits under the Trading with the Enemy Act. But two aspects of that case made it very different, as the Supreme Court itself pointed out, from McGrath v. Kristensen and the related cases upon which the Medical Committee here relies. In Schilling it

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the Commission's initial refusal to act. As emphasized in the cases cited above in the text, the Medical Committee had a right, if the Commission was to do anything at all, to have the Commission act in accordance with correct legal principles, and, if the Commission has done otherwise, the Medical Committee's rights have been violated. As Mr. Justice Jackson said in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185 (1951) (concurring opinion), in discussing the refusal by the Secretary of State to issue a passport in Perkins v. Elg,

> "The Secretary might say that [the applicant] would get no passport, but he could not, for unjustifiable reasons, say she was ineligible for one."

As the Commission's brief emphasizes, a decision by this Court thus may not automatically resolve, to the complete satisfaction of the Medical Committee, "the continuing controversy between the Medical Committee and Dow" (Br. p. 31), but that is not a reason for a refusal by this Court to ensure that, when the Commission chooses to act, it does so in accordance with law.

was not possible for the Court to treat the question of eligibility as a legal issue separable from the discretionary elements of the case, and the Court distinguished McGrath v. Kristensen on that ground. 363 U.S. at 674. Secondly, and perhaps more importantly, the Court in Schilling read the Trading with the Enemy Act as affirmatively forbidding judicial review of any aspect of the administrative decision-making process involved.[1/] In contrast, in this case the legal issue of the interpretation of the Proxy Rules is a wholly separable and purely legal issue which is readily reviewable, and here the enabling statute not only does not preclude review -- it contains an affirmative provision (Section 25(a)) requiring it. Hence the Schilling exception to the doctrine of partial reviewability has no application here.[2/]

1/ "We conclude that the Trading with the Enemy Act excludes a judicial remedy in this instance and that because of this, as well as because of the discretionary character of the administrative action involved", judicial review would be inappropriate. 363 U.S. 676. (Emphasis supplied.)

2/ Immediately after its discussion of Schilling, the Commission's brief cites a string of cases which hold, the Commission says, that an exercise of what it calls "permissive discretion" is non-reviewable (Br. pp. 28-29). It is true that there are some decisions that have talked in such terms, and the analysis presented in those cases (including some of the cases cited in the Commission's brief) has been severely criticized by the commentators as "unsound and unworkable", "without practical justification", and "a mode of analysis . . . largely illusory" and "contrary to the Administrative Procedure Act". Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion", 82 Harv. L. Rev. 367, 397 (1968), citing

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The Commission's brief also attempts to distinguish the "partial reviewability" cases (Perkins v. Elg., supra, etc.) on two different grounds. First, they say that in all those cases the administrative agency involved was "required under law to make a discretionary decision" (Br. pp. 25-26) (emphasis supplied), whereas in the instant case the SEC could lawfully have ignored the controversy between Dow and the Medical Committee and rendered no decision. The attempted distinction is untenable. For example, in Office Employees the NLRB was legally free to ignore the controversy between the union and the "employer", but when it chose to act on the union's complaint, the agency subjected itself to judicial scrutiny as to any legal errors committed in its decision-making process. Similarly, in the two very recent cases of Red Lion Broadcasting Co. v. FCC, 127 App. D.C. 129, 381 F.2d 908 (D.C. Cir. 1967), aff'd, 395 U.S. 367 (1969), and Banzhaf v. FCC, 132 App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 38 U.S. Law Week 3117 (Oct. 13, 1969), the agency was free to ignore the petitioner's request for aid, but, like

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(Footnote continued)

Jaffe, Judicial control of Administrative Action, 181 (1965); 3 Davis, Administrative Law Treatise § 23.11 at 356 (1958); Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 333 (1967). But the strength or weakness of the cases cited in the Commission's brief at pages 28-29 requires no extensive comment here, simply because each of those cases involved the propriety of judicial review, not of a legal decision made by the agency, but of a discretionary or factual judgment of a kind not here involved.

the Commission here, it chose to render a decision, and it thereby established a jurisdictional basis for review.[1/]

The two last-cited decisions are also instructive in other respects. First, they establish that the Commission's failure here, when it made its final decision, to issue a specific piece of paper entitled "an order" does not mean that the Commission did not take that kind of final administrative action which is a prerequisite to judicial review. In both cases the courts treated an informal letter of the particular administrative agency as a reviewable "order", consistent with the general presumption in favor of judicial review of any final administrative action, regardless of its form.[2/] Secondly,

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1/ The very fact that in shareholder-management disputes of this kind the Commission is free to decide the issue or not, as it chooses, should lay to rest the Commission's deep concern that judicial review in this case would discourage the Commission in the future from rendering valuable "informal advisory opinions" and that this would be a bad thing (Br. pp. 34-36)(emphasis supplied). The answer is that under Section 25(a) of the Securities Exchange Act judicial review can be had only of "an order issued by the Commission in a proceeding under this title". If there is no proceeding, or if the Commission itself does not act, the statute will not come into play. This means that the Commission can render all the informal advice it wishes, so long as a proceeding is not involved, and that the Commission staff can also render an unlimited number of advisory opinions -- all without fear of judicial review. We agree that "informal advisory opinions" may serve a useful function, but no such opinion is involved here. See p. 5, supra.

2/ See Jaffe, Judicial Control of Administrative Action, 358-59 (1965):

(Continued)

Red Lion strongly indicates that if the Commission in this case had resolved the legal issue before it in the opposite way -- that is, if the Commission had held that Dow could not legally exclude the Medical Committee's proposal from its proxy materials, and if the Commission had notified Dow of its view of the law -- that legal decision of the Commission would have been reviewable by this Court on a petition for review filed by Dow.[1/] Under these circumstances it is hard to see how it could now fairly be held that the Medical Committee is not entitled to the same relief.

Finally, the Commission claims that, whatever might be the situation if the Medical Committee had no alternative remedy in its contest with Dow, the fact that

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(Footnote continued)

> " . . . absent a clear [Congressional] intention to exclude review, an action which finally denies all [administrative] relief should be construed as a statutory 'order' . . . . "

See also AFL v. NLRB, 308 U.S. 401, 408 (1940).

1/ In Red Lion the FCC wrote a regulated entity (a broadcasting station) a letter indicating that, in the agency's view, the station had failed to comply with the so-called "Fairness Doctrine" and requesting that the station "advise the Commission of your plans to comply". 381 F.2d 908, 913 (D.C. Cir. 1967). The letter constituted a reviewable "order" from which a direct appeal could be taken by the station. 395 U.S. at 372. See 47 U.S.C. 402(a).

it could have sought relief through a lawsuit of its own (instead of appealing to this Court now) deprives it of the right to direct judicial review at this time (Br. pp. 26-27). But the short answer to this suggestion is that this Court itself has made clear, with respect to the very jurisdictional statute involved in this case, that the theoretical possibility that a private lawsuit in a Federal district court would provide the petitioner with an alternative avenue of relief does not defeat petitioner's affirmative right under Section 25(a) of the Securities Exchange Act to obtain direct appellate review of adverse Commission action. Thus in American Sumatra Tobacco Company v. SEC, supra, a case on which the Commission heavily relies, this Court took jurisdiction to review a decision of the SEC under Section 25(a), despite the fact that the petitioner apparently could have brought one or more independent suits for equivalent relief. Counsel for the SEC there argued that the alternative remedies militated against the petitioner's right to direct review, but this Court rejected the argument, observing that the alternative courses would be "inconvenient" and "would constitute circuitous routes for the determination of issues easily and directly determinable by review in this court." 93 F.2d at 241. Moreover, the Administrative Procedure Act itself expressly recognizes that when "agency

action" is "made reviewable by statute", such review must be afforded, whether or not there is some "other adequate remedy in a court."[1/] Compare Sperry-Rand Corp. v. FTC, 110 App. D.C. 1, 288 F.2d 403 (D.C. Cir. 1961), with FTC v. Nash-Finch, 110 App. D.C. 5, 8; 288 F.2d 407, 410 (D.C. Cir. 1961).[2/]

1/ 5 U.S.C. § 704 provides in relevant part as follows:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

2/ In a footnote in its brief (p. 19, n.23) the Commission makes some slight attempt to argue that the Medical Committee was not "aggrieved" by the Commission's adverse decision, within the meaning of Section 25(a), because the Medical Committee has a theoretical right to sue Dow in an independent action. The discussion in the text demonstrates that the theoretical existence of an alternative remedy is legally irrelevant to the question whether Section 25(a) gives the petitioner a right to judicial review. Moreover, the Commission's suggestion of a lack of "aggrievement" on this basis is inconsistent with other positions taken in its brief. As we understand it, the Commission would agree that, if it had conducted "an adjudicatory proceeding" and had entered a formal "declaratory ruling" in favor of Dow and against the Medical Committee (which the Commission correctly says it could have done, Br. p. 37), the Medical Committee could then have obtained review by this Court on the ground that it was "aggrieved" -- despite the fact that, in those circumstances also, the Medical Committee would have had an alternative remedy available through an independent lawsuit. Thus, under the Commission's own theory, the existence of that other remedy is irrelevant to the question of this Court's jurisdiction under Section 25(a).

D. The Commission's Rather Indirect Expression of Its Legal Decision Below Does Not Prevent Review of that Decision Now

The last section of the Commission's brief is devoted to the proposition that what it did below was really extremely "informal" (even though it acted pursuant to its own "formal procedures" [1]) and that, in any event, this Court does not really know the basis of the Commission's decision. Even though the Commission staff made a tentative ruling that Dow was legally entitled to exclude the Medical Committee's proposal pursuant to Proxy Rules 14a-8(c)(2) and (5) (R.20a-21a), and even though the Commission approved the staff's position (R.44a-46a), the Commission's brief now says that this Court is not entitled to draw from those facts any "inference" as to the grounds of the Commission's action, that judicial "speculation" on this matter would be "inappropriate", and that in these circumstances the Court should not even hear the case (Br. pp. 33-34).

As indicated in a previous section of this brief, the Medical Committee regards this as an extraordinary position for a public agency to take. Obviously the agency

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1/ This procedural aspect of the instant case distinguishes it from the "informal advisory" situations discussed in the Commission's brief at pages 34-36. It should also be noted that in the case of First Savings & Loan Association of the Bahamas, Ltd. v. SEC, 358 F.2d 358 (5th Cir. 1966), there had been a failure by the petitioner to exhaust his administrative remedies, which is not so here.

knows what it did and could easily tell the Court. And yet they now use their own refusal to make a forthright disclosure of the grounds of their decision as a shield against all judicial review. This position is both disrespectful and legally insufficient.

As we have indicated, the facts establish the strong probability that in its decision below the Commission was adopting a specific interpretation of the Proxy Rules, and we have also shown that the Court is entitled in the circumstances to assume that that interpretation was the ground of the Commission's decision (see pp. 3, 10, supra). The decided cases make clear that in such circumstances, where there are indications that the administrative agency below rested its decision upon erroneous legal grounds, the reviewing court can and should take jurisdiction, resolve as many of the apparent problems as it can (in order to avoid needless delay), and then remand to the agency for further proceedings not inconsistent with the court's opinion.[1/]

1/ Thus in NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965) and Northeast Airlines v. CAB, 331 F.2d 579, 587 (1st Cir. 1964), the reasoning of the agency's decision below was not completely clear, but that fact did not defeat appellate jurisdiction. In both cases the court clarified the applicable law as far as it could in the circumstances and only then remanded the case for further proceedings consistent with the opinion. It should also be noted that the Commission completely misreads the Morgan cases cited in its brief at page 34. Those cases held that an administrator cannot be personally examined on the witness stand with respect to each detail of the thinking process by which he arrived at his decision; they certainly do not support the proposition that an agency's failure to enunciate, as explicitly as possible, the grounds of a final administrative decision immunizes the decision from appellate judicial review.

It should be noted that, if this Court were now to decline to decide the legal issue evidently posed by the Commission's decision below, the Medical Committee would thereby be effectively deprived of any remedy in its continuing controversy with Dow. The time for the submission of shareholder proposals for inclusion in management's proxy materials for the 1970 annual meeting is fast approaching, and there is an immediate need to have the legal issue between Dow and the Medical Committee authoritatively resolved. Since the Court clearly has jurisdiction to decide that issue, we respectfully submit that it should do so at once and establish the rights of the parties on this legal issue once and for all.

CONCLUSION

It is entirely appropriate for this Court to review the apparent decision of law made by the Securities and Exchange Commission below. If the Court then determines that that decision was legally erroneous, the matter can be remanded to the Commission for such further proceedings as the Commission may deem appropriate in its discretion,

provided only that such action not be inconsistent with the correct legal principles enunciated in the Court's opinion.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Order of the
Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND
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ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether this Court has jurisdiction to review a determination by the Securities and Exchange Commission not to take any enforcement action based upon a complaint received.

RULE 8(d) STATEMENT

A panel of this Court, consisting of Circuit Judges McGowan, Tamm and Leventhal, has previously entertained the Commission's motion to dismiss the instant petition for review. On October 13, 1969, the motion was denied (Judge Tamm dissenting) "without prejudice to renewal thereof in the briefs and at the argument on the merits."

PRELIMINARY STATEMENT

By this brief, the Commission renews its motion to dismiss the petition for review.[1/] As set forth in the motion, this Court lacks jurisdiction because, among other things:

1. The Medical Committee for Human Rights ("Medical Committee"), petitioner herein, is not a person aggrieved by any order issued by the Commission in any proceeding, nor was it a party to a proceeding; and
2. The petition for review relates solely to matters committed to Commission discretion by law.

As more fully set forth below, the Commission expressed no view concerning the legal issues raised by the Medical Committee when the Commission decided to take no action with respect to the matters of which the Medical Committee complained (App. 46a).[2/] Consequently, Commission counsel have not been authorized to express on behalf of the Commission any view concerning the application or interpretation of the exemptive provisions of Rule 14a-8 adopted by the Commission under the Securities Exchange Act, 17 CFR 240.14a-8, with respect to the Medical Committee's controversy with the Dow Chemical Company ("Dow").

1/ That motion and an affidavit of Matthew Jaffe in support of the renewed motion are attached to this brief as a Supplemental Appendix.

2/ References to the Joint Appendix are cited as "App. __a." References to the brief on the merits filed by the Medical Committee are cited as "Br. __." References to the Medical Committee's Memorandum in Opposition to the Commission's motion to dismiss this petition are cited as "Mem. __." References to the Supplemental Appendix are cited as "SA ____."

COUNTERSTATEMENT OF THE CASE

This proceeding seeks review of a Commission determination (App. 46a) to take no action with respect to the stated intention of Dow (App. 11a, 12a and 18a) to omit from its proxy material certain proposals put forth by the Medical Committee, one of Dow's shareholders. As is more fully described below, see infra, pp. 14-18, pursuant to Rule 14a-8 under the Securities Exchange Act, the Commission has accorded holders of voting shares of certain publicly held corporations a limited right to have certain proposals for shareholder action included in the management's proxy material.

On March 11, 1968, the Medical Committee informed Dow that it had become the owner of Dow shares[3/] and requested that a resolution be submitted to Dow's shareholders authorizing Dow's Board of Directors to amend the company's charter to prohibit the sale of napalm by Dow to any buyer refusing to give assurances that the napalm would not be used "on or against human beings" (App. 1a-3a).[4/] The Medical Committee noted that its "objections to the sale of this product

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3/ The Medical Committee apparently did not become a stockholder of record of Dow until March 22, 1968, when the five shares it received were transferred to it (App. 34a).

4/ The text of the resolution was as follows (App. 2a):

> "'RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings.'"

is [sic] primarily based on the concerns for human life inherent in our organization's credo" (App. 2a). 5/ Dow took the position that this request was received ". . . too late . . . to be considered in connection with . . . [Dow's] annual meeting of May 8, 1968 . . ." (App. 4a). The request was renewed by the Medical Committee on January 6, 1969, for inclusion in the proxy material mailed to shareholders in connection with Dow's 1969 annual meeting (App. 7a-8a).

Dow notified the Commission of the Medical Committee's proposal (App. 12a-13a) and advised both the Commission and the Medical Committee that it had decided to omit the proposal from its proxy materials (App. 11a, 12a), setting forth the opinion of its counsel (App. 9a-10a) to the effect that the proposal could appropriately be omitted under Rules 14a-8(c)(2) and (5), (see p. 15 n.18, infra), as ". . . promoting a general political, social or similar cause" (App. 10a), and as solely consisting of a recommendation ". . . with respect to . . . the conduct of . . . [Dow's] ordinary business operations . . ." (App. 9a).

Thereafter, on February 3, 1969, the Medical Committee sent Dow a "new request" (App. 14a), which was designed ". . . to meet certain of the objections [Dow had raised] to . . . [the Medical Committee's

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5/ The Medical Committee offered (App. 2a) as additional reasons militating in favor of its resolution the facts that, as a result of napalm sales, ". . . it is increasingly hard [for Dow] to recruit . . . highly intelligent, well-motivated, young college men . . ." and the sale of napalm has ". . . an adverse impact on . . . [Dow's] global business . . . ."

initial proposal . . ." (App. 15a).[6/] It also sent to the Commission's staff a copy of this proposal (App. 17a) with a request that the ". . . staff review . . . Dow's decision" (id.). The Medical Committee requested an oral argument before the Commission in the event the staff should agree with Dow's conclusions. Dow again notified the Commission and the Medical Committee of its decision to exclude the proposal from its proxy materials (App. 18a) and enclosed a second opinion of counsel (App. 19a), reaffirming counsel's prior conclusion (p. 4, supra) ". . . that under Rules 14a-8(c)(2) and (5) the proposal . . . is one that the Company may omit from its proxy statement . . . ." Dow's counsel also suggested that if the Medical Committee's second proposal was a new proposal, it could also be omitted pursuant to Rule 14a-8(a), infra, p.14 n.16, which requires any such proposals to be submitted to the company at least 60 days in advance of the day corresponding to the first date on which the company's proxy soliciting material was released to shareholders in connection with the previous year's annual meeting. That date was apparently March 25, 1968 (App. 19a), so that, if a new proposal, it should have been submitted prior to January 24, 1969, rather than on February 3, 1969.

6/ The new proposal offered by the Medical Committee read as follows (App. 16a):

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws [sic] of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

On February 18, 1969, the Commission's Division of Corporation Finance informed the Medical Committee (App. 21a) and Dow (App. 20a) that the staff would ". . . not recommend any action to the Commission if . . . [the Medical Committee's] proposal is omitted from the Company's proxy soliciting material" (App. 21a).[7/]

Thereafter, the Medical Committee renewed its request (App. 24a) for review by the Commission of the staff's decision to raise no objection to Dow's omission of the Medical Committee's proposal,[8/] and the Medical Committee set forth the reasons why it believed Dow should have included its proposals in the proxy materials. The Commission, on March 24, 1969, ". . . determined to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights" (App. 46a) and counsel was orally informed that day of the Commission's determination (SA 3). The Commission also denied the request of counsel for the Medical Committee to be heard by the Commission. On April 2, 1969, the staff by letter confirmed to counsel for Dow and the Medical Committee the nature of the Commission's determinations (App. 44a, 45a).[9/]

7/ In its letter to Dow, the staff indicated its decision was predicated on the ". . . reasons stated in . . . [Dow's] letter and the accompanying opinion of counsel . . ." (App. 20a).

8/ Counsel for the Medical Committee erroneously stated that the staff had decided ". . . to permit Dow to exclude this [the Medical Committee's] proposal . . ." (emphasis supplied) (App. 24a). Similar characterizations of the staff's action have been made in the course of this petition. See, e.g., Br. 10.

9/ The Medical Committee refers to this letter, written by a member of the Commission's staff, as the action it seeks to have reviewed.

On May 29, 1969, some 66 days after the Commission's determination and oral notification thereof to counsel and some 57 days after written confirmation of the Commission's determinations had been made, the instant petition for review was filed.

STATUTES AND RULES INVOLVED

Sections 14(a) (p. 13 n.13) and 25(a) (pp. 10-11 n.12) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a) and 78y(a), and Rule 14a-8, 17 CFR 240.14a-8 (pp. 14-16, nn.16-19), are involved.

ARGUMENT

THIS COURT IS WITHOUT JURISDICTION OF THIS PETITION TO REVIEW

A. This Court Lacks Jurisdiction of the Petition to Review Because the Petition Was Not Timely Filed.

At the outset it should be noted that the Commission, as it did in its prior motion to dismiss, takes the position that it has not issued an "order" that is subject to judicial review. See pp. 14, et seq., infra. But, even should this Court conclude that such an order was issued, we submit that this Court may not assert jurisdiction since the petition for review was not timely filed.

Section 25(a) of the Securities Exchange Act, pursuant to which the Medical Committee purportedly seeks review, provides that review of a Commission "order" may be obtained by filing a petition for review in an appropriate court of appeals ". . . within sixty days after the entry of such order . . . ."

As noted supra, pp. 6-7, the Medical Committee's petition for review was filed 66 days after the date on which the Commission's determination was made and on which counsel for the Medical Committee was orally notified thereof.

Under Rule 22(k) of the Commission's Rules of Practice, 17 CFR 201.22(k), the date of entry is defined to include ". . . the date of the adoption of the order by the Commission, as reflected in the caption of the order . . . ."[10/] Since the Commission did not purport to enter an order, as such, there was no "caption" in terms, but the Commission's minute (App. 46a) makes clear that the determination of the Commission was made on March 24, 1969. See M. G. Davis & Co. v. Cohen, 256 F. Supp. 128, 132-133 (S.D. N.Y.), affirmed, 369 F. 2d 360 (C.A. 2, 1966), where it was held that for administrative purposes "entry" occurs at the time of Commission action, even though a concerned person is not informed of the Commission's action until several days

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10/ In response to the Commission's prior motion to dismiss the petition, the Medical Committee relied (Mem. 9) on the case of Lile v. Securities and Exchange Commission, 324 F. 2d 772 (C.A. 9, 1963). In that case, the court ruled that the failure of the Commission to follow its own rule requiring that "a docket of all proceedings shall be maintained by the Commission" (former 17 CFR 201.22(b)), precluded a finding that the order of the Commission had been entered. Subsequent to that decision, the Commission repealed Rule 22(b) of its Rules of Practice and adopted present Rule 22(k), redefining what constitutes the entry of an order. Securities Exchange Act Release No. 7250 (March 5, 1964), 29 Fed. Reg. 3424, 3425 (March 17, 1964).

later.[11/] In any event, here, counsel for the Medical Committee was orally notified of the Commission determination on the date it was made (p. 6, supra).

Because the petition for review was untimely filed, this Court is without jurisdiction. This lack of jurisdiction cannot be remedied by the acquiescence of the parties or by an order of the Court. Securities and Exchange Commission v. Louisiana Public Service Commission, 353 U.S. 368 (1957); Panhandle Eastern Pipe Line Co. v. FPC, 343 F. 2d 905, 906-907 (C.A. 8, 1965); Texaco, Inc. v. FPC, 290 F. 2d 149, 157 (C.A. 5, 1961); Kelaghan v. Securities and Exchange Commission, 288 F. 2d 67, 69 (C.A. 1, 1961); Michigan Consolidated Gas Co. v. FPC, 83 App. D.C. 395, 167 F. 2d 264 (1948); In re NASD, Inc., 4 S.E.C. Jud. Dec. 669 (C.A. 2, March 9, 1946); Columbia Oil & Gasoline Corp. v. Securities and Exchange Commission, 134 F. 2d 265, 266-267 (C.A. 3, 1943); Louisville Gas & Electric Co. v. FPC, 129 F. 2d 126 (C.A. 6, 1942), certiorari denied, 318 U.S. 761 (1943); In re Valley Gas Co., 193 F. Supp. 808, 812 (D. R.I., 1960).

11/ Texas-Ohio Gas Co. v. Federal Power Commission, 93 App. D.C. 117, 207 F. 2d 615 (1953), does not suggest the contrary. That case involves a statute providing that where the Federal Power Commission does not act upon an application for rehearing within 30 days after it is filed the application might be deemed to have been denied, although the statute presumably also permits the Commission to take action upon the application for rehearing at a later date. It was held that where no formal action had ever been taken with respect to the application, the time for review did not start to run before notice was given that the application might be deemed to have been denied.

B. <u>This Court Is Without Jurisdiction of the Petition To Review Because the Medical Committee Has Not Been Aggrieved by an Order Issued by the Commission in any Proceeding, Nor Was the Medical Committee a Party to a Proceeding.</u>

1. Only "Judicial Orders" of the Commission Are Reviewable.

The Medical Committee relies exclusively upon Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a), in asserting that this Court has jurisdiction of its petition for review (Mem. 25).[12/]

12/ Section 25(a) provides:

> "Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such a manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the

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Accordingly, it must have been "aggrieved by an order issued by the Commission" in a "proceeding" to which the Medical Committee was a "party." The absence of any of these statutory elements is fatal to a petition for review. As we show below, these elements are absent here; accordingly, this Court is without jurisdiction of the instant petition for review.

This Court recognized in American Sumatra Tobacco Corp. v. Securities and Exchange Commission, 68 App. D.C. 77,80, 93 F. 2d 236, 239 (1937), that by Section 25(a) "Congress has undertaken to provide within the Securities Exchange Act the machinery by which judicial orders of the Commission may be reviewed" (emphasis added). Its analysis in this respect was confirmed when the Supreme Court reached a like conclusion concerning the substantially similar judicial-review provisions contained in Section 313(b) of the Federal Power Act, 49 Stat. 860, 16 U.S.C. 8251(b):

> "The context in §313(b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court 'a transcript of the record upon which the order complained of was entered.' The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may

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12/ (continued)

> modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

> order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 384 (1938) (emphasis added). Compare, Rule 16 ("The Record on Review or Enforcement") and Rule 17 ("Filing of the Record") of the Federal Rules of Appellate Procedure.

2. The Filing Requirements of the Proxy Rules Create No Procedure for Entry of a "Judicial Order" by the Commission but Are Designed to Promote Informal Procedures Looking toward Compliance and to Aid the Commission in Determining Whether Enforcement Action Is Appropriate.

The Securities Act and the Securities Exchange Act contain various sections where provisions for adjudicatory proceedings, involving opportunity for an evidentiary hearing, are set forth. See, e.g., Securities Act Sections 8(b), 15 U.S.C. 77h(b)(refusal orders), 8(d), 15 U.S.C. 77h(d) (stop orders), and 10(b), 15 U.S.C. 77j(b)(suspension of use of prospectus); and Securities Exchange Act Sections 6, 15 U.S.C. 78f (grant or denial of registration as a national securities exchange), 12(f), 15 U.S.C. 78l(f) (termination or suspension of unlisted trading privileges on a national securities exchange), 15(b)(5), 15 U.S.C. 78o(b)(5) (denial or revocation of registration as a broker-dealer)and 19(a)(1), 15 U.S.C. 78s(a)(1) (suspension or withdrawal of registration of a national securities exchange). No such provision is contained in Section 14(a) of the Securities Exchange Act, dealing with proxies. That section makes unlawful action taken "in contravention of such rules and regulations as the Commission may pre-

scribe . . ." with respect to the solicitation of proxies.[13] The Commission's rules pursuant to that section have both substantive and procedural provisions, but nowhere purport to provide an adjudicatory procedure within the Commission. Instead, as noted by a leading text dealing with the Commission's proxy regulation, the Commission attempts to utilize "informal methods to secure compliance with the Proxy Rules."[14] It is there pointed out:

> "It is the practice of the Commission to make every effort to secure compliance by direct negotiation with the soliciting group; but, failing in such efforts, the Commission must resort to court action."[15]

The Medical Committee's entire argument that there was a "proceeding" before the Commission to which it was a "party" (Mem. 26-31) is based upon its assertion that Rule 14a-8, adopted by the Commission under the Securities Exchange Act of 1934, 17 CFR 240.14a-8, provides for adjudicatory procedures (Mem. 13-15). A reading of Rule 14a-8, however, shows that, consistent with the Commission's authority under Section 14(a), the Rule

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13/ Section 14(a), 15 U.S.C. 78n(a), provides:

> "It shall be unlawful for any person . . . in contravention of such rules and regulations as the Commission may prescribe . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered pursuant to" Section 12 of the Act.

Cf. Section 12(e) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79l(e), which makes unlawful solicitation of proxies "in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate . . ." (emphasis supplied).

14/ Aranow and Einhorn, Proxy Contests for Corporate Control 450 (2d ed. 1968).

15/ Id. at 451.

does no more than establish a standard concerning shareholder proposals to which management must conform and, through a filing requirement, provides a means by which the Commission may judge the necessity for enforcement action.

The substantive standards which the Medical Committee contends have not been met by Dow are contained in paragraphs (a), (b) and (c) of Rule 14a-8. Paragraph (a) of Rule 14a-8, 17 CFR 240.14a-8(a), provides that if a shareholder makes a timely submission to management of a proposal that he wishes to present at a stockholders' meeting, that proposal is to be included in the management's proxy material.[16/] Paragraph (b), 17 CFR 240.14a-8(b), provides that if management should oppose the proposal, the shareholder must also be allowed to include

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16/ "If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which security holders can make the specification provided for by Rule 14a-4(b) ($240.14a-4(b)). The managment of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This section does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management."

in the proxy statement a short supporting statement.[17] Paragraph (c), 17 CFR 240.14a-8(c), provides that under specified circumstances "the management may omit a proposal and . . . statement . . ." from its proxy materials.[18] The basic requirements reflected in these provisions have been contained in the proxy rules since the predecessor to Rule 14a-8--then designated Rule X 14A-7--was first adopted in 1942; see 7 Fed. Reg. 10656 (Dec. 22, 1942).

17/ "If the management opposes the proposal it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address of the security holder is omitted from the proxy statement, it shall be furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a-6(a) ($240.14a-6(a)). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement."

18/ "Notwithstanding the foregoing, the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

. . .

"(2) If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or

. . .

"(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

The Medical Committee relies almost exclusively upon paragraph (d) of the Rule, an additional provision, adopted in 1947, 12 Fed. Reg. 8768 at 8770 (Dec. 24, 1947), that requires management to advise the Commission and the shareholder should management determine that it is not obliged under the rule to include the shareholder's proposal and intends to omit it from the proxy materials.[19/] It is this filing requirement that the Medical Committee contends initiates a proceeding of an adversary nature before the Commission (Mem. 7, 30). But neither expressly nor by fair implication does this requirement provide for staff or Commission review of "the issues as presented by the parties" (Mem. 14)(emphasis added). Since the shareholder is not obliged to support its request for inclusion, the management's statement of its reasons for omission can hardly be said to constitute "opposing views" (Mem. 13). And, contrary to the characterization by the Medical Committee, the Rule avoids the term "serve" (Mem. 14) in providing that management

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19/ "Whenever the management asserts that a proposal and any statement in support thereof may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission, not later than 20 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to § 240.14a-6(a), or such shorter period prior to such date as the Commission may permit, a copy of the proposal and any statement in support thereof as received from the security holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel. The management shall at the same time, if it has not already done so, notify the security holder submitting the proposal of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of the reasons why the management deems the omission of the omission of the proposal to be proper and a copy of such supporting opinion of counsel."

"shall forward" a copy of its reasons to the shareholder. Most significantly, the Rule does not provide that either the staff or the Commission "shall review the issues" presented by the "parties," or that either will "make . . . [a] decision" (Mem. 14). These assertions and the contention that a legal conclusion is "necessarily" contemplated by the Rule (Mem. 15) are unjustified.

Although one of the releases issued by the Commission in the course of the Rule's historical development, Securities Exchange Act Release No. 4979 (Jan. 6, 1954), 19 Fed. Reg. 246 (Jan 14, 1954), refers to management's "burden of proof,"[20/] neither the release nor the rule indicates that the burden shall be upon management in an administrative proceeding before the Commission, as the Medical Committee has strongly implied (Mem. 14, 26). Since the omission of a proposal is an exception to the Rule, and the burden of establishing any exemption claimed under the remedial provisions of the federal securities laws is upon the one who asserts it,[21/] such a burden of proof would be upon the management in an injunction proceeding brought either by the Commission or by the shareholder.

A purpose of the amendment to the Rule set forth in that release was to provide that, twenty days earlier than had previously been required, management's explanation of an omission must be filed with the Commission and sent to the shareholder. While, as has been noted by the Medical Committee, one reason for the change was to afford the Commission more

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20/ The release observes that "[t]he rule places the burden of proof upon the management to show that a . . . proposal is not a proper one for inclusion in management's proxy material. . . ." Securities Exchange Act Release No. 4979 at 2, 19 Fed. Reg. at 246.

21/ Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 126 (1953).

"time to consider the problems involved . . ." (Mem. 13), an additional reason stated in the release was "[s]o that . . . the security holder will have an opportunity to consider the management's position and take such action as may be appropriate . . ." (emphasis added). Securities Exchange Act Release No. 4979 at 2, 19 Fed. Reg. at 246.[22/] But in any event, it certainly does not follow that filing requirements designed to give the Commission and its staff "time to consider the problems involved" imply the creation of an adjudicatory procedure. Such consideration is no less necessary in connection with attempts to achieve compliance by informal procedures and to aid in the enforcement function contemplated by the statute. If the Commission has reason to suspect a violation of the proxy rules it "may, in its discretion," investigate to ascertain the facts, and "may, in its discretion, bring an action . . . to enjoin" apparent violations. Sections 21(a) and 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(a) and 78u(e). Indeed, the Medical Committee itself recognizes that the filings made in connection with the proxy rules are designed to permit the Commission's staff to investigate whether enforcement action is required (Mem. 10).

22/ While at one time it was by no means clear that stockholders could bring a court proceeding to enforce the proxy rules, court decisions before the Commission's adoption of the release referred to above had recognized that securityholders have an implied private right of action under the proxy rules. See Phillips v. United Corp., 5 S.E.C. Jud. Dec. 445 (S.D. N.Y., 1947); cf. Tate v. Sonotone Corp., 5 S.E.C. Jud. Dec. 310 (S.D. N.Y., 1947). See generally, Aranow and Einhorn, supra n.14, at 464-467, 470-480.

Of course, along with information otherwise obtained by its staff in connection with such an investigation, the Commission is often the recipient of evidence and arguments from interested persons which it may consider in reaching an opinion whether a violation exists and, if so, whether court action is appropriate in the circumstances. But the Commission's consideration of such matters, and the courtesy of a response to a complaining person, does not turn an exercise of discretion into an adjudication, convert the complainant into a party to a proceeding or transform the Commission's determination not to bring an enforcement action into an "order" of the Commission by which the complainant is "aggrieved."[23/]

Furthermore, the Commission has established procedures of its own relating to the conduct of adjudicatory proceedings, see Rules of

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23/ The Medical Committee claims it is aggrieved by action taken by the Commission because (1) the Commission erroneously interpreted the rules it has promulgated under Section 14(a) of the Securities Exchange Act, and (2) the Medical Committee is now forced to litigate its claims, should it desire to do so, directly with Dow (Mem. 19, 42-47). But the Medical Committee has fully retained whatever rights it possessed prior to the Commission action of which it complains. Accordingly, the merits of the Medical Committee's claim that Dow has violated the proxy rules remains to be litigated, and the Supreme Court has recognized the efficacy of a private action to compel compliance with proxy rule provisions, J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

The doubtful suggestion that a lawsuit against Dow would be "far more burdensome and expensive . . ." (Mem. 46), even if true, provides no basis for concluding that the Medical Committee is aggrieved by the Commission's determination; ". . . the expense and annoyance of litigation is 'part of the social burden of living under government,'" Petroleum Exploration, Inc. v. Public Service Commission, 304 U.S. 209, 222 (1938) (footnote omitted).

Practice, 17 CFR 201.1 et seq.,[24] and is, of course, obliged to comply with those requirements of the Administrative Procedure Act that pertain to adjudications, now codified as 5 U.S.C. 554. The facts that the Commission did not purport to act in accordance with those provisions, and that the Medical Committee found no basis to object to the manner in which the Commission did proceed, demonstrate that neither understood the Commission's consideration to involve adjudication.[25] Of course, in this respect the Commission's construction of its own rules is entitled to great weight. Union Pacific R. Co. v. Chicago & Northwestern Ry. Co., 226 F. Supp. 400, 408 (N.D. Ill., 1964):

> "The words to be interpreted here are the language of the SEC, exercising its power to prescribe standards, and the meaning

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24/ Rule 1 of the Rules of Practice, 17 CFR 201.1, defines the Rules as being:

> ". . . generally applicable to proceedings before the Commission under the statutes which it administers, particularly those which involve a hearing or opportunity for hearing before the Commission or its duly designated officer . . . . These rules do not apply to investigations, except where made specifically applicable by the Rules Relating to Investigations . . . ."

25/ The Commission's Rules of Practice reflect its recognition that in its adjudicatory proceedings two private parties are never direct adversaries in the first instance. Private persons desiring to take a position contrary to that of a petitioner or respondent in a Commission proceeding must formally seek leave to participate in the proceeding. Had there been a "proceeding" looking toward an adjudication here, Dow would have had to be a party, since the action the Medical Committee seeks would have been directed to it. Under Rule 9(e) of the Commission's Rules of Practice, 17 CFR 201.9(e), a private person not named as respondent in a proceeding may intervene as a party only if formally granted that status. The Medical Committee did not apply for and was not granted status as a party. Accordingly, even if there were an appealable order, the Medical Committee would lack standing to appeal under Section 25(a) because it would not be a "party."

of those words is illuminated by the intent revealed in their application by the SEC itself."26/

The Medical Committee has been unable to cite any authority which suggests that either the Commission or any Court or commentator has ever interpreted Rule 14a-8 as providing procedures for the adjudication of controversies between management and shareholders with respect to the exclusion of a shareholder's proposal from the management's proxy material. In this respect, the Medical Committee's emphasis upon the novelty of its contentions (Mem. 9) may prove too much. The fact that during the 27 years since the Commission first provided for the inclusion of stockholders' proposals in management's proxy material, or in the 22 years since the related filing requirement was added, no authority has suggested that the rule provides for an adjudication certainly reflects a general understanding that does not so provide and that it creates no exception to the general pattern by which ". . . review by the Commission of . . .[proxy]

26/ The agency that promulgated the rule is in the best position to know what it meant when it adopted the rule and to interpret the application of its rule based on the requirements of the public interest. One might suggest, in fact, that respect for agency construction is implicit in the Congressional grant of rule making power since it is entirely proper for an agency to modify or amend its rules to avoid what it considers unwarranted implications in a judicial interpretation. Compare Lile v. Securities and Exchange Commission, supra, 324 F. 2d 772, with Securities Exchange Act Release No. 7250 (March 5, 1964), 29 Fed. Reg. 3424-3425 (March 17, 1964), and Feder v. Martin Marietta Corp., 406 F. 2d 260 (C.A. 2, 1969), petition for certiorari filed, 37 U.S.L.W. 3452 (U.S., May 16, 1969)(No. 1404, 1968 Term; renumbered No. 125, 1969 Term), with Securities Exchange Act Release No. 8574 (April 17, 1969), 34 Fed. Reg. 7250 (May 2, 1969), where questions raised by court decisions have been resolved or clarified by the subsequent exercise of the Commission's rulemaking power.

material is informal in nature."[27/]

3. Commission Decisions as to Whether Enforcement Procedures Should Be Instituted Are Wholly Discretionary and as Such Are Not Subject to Judicial Review.

The Court of Appeals for the Second Circuit has twice considered petitions to review enforcement determinations made by the Commission in connection with its proxy rules. In Peck v. Securities and Exchange Commission, C. A. 2, No. 22,289, April 7, 1952, the petitioner, like the Medical Committee in the case at bar, had sought inclusion in a proxy statement of a proposal that the company's management decided it was entitled to omit. By his petition Mr. Peck had asserted the court's jurisdiction to review the Commission's refusal to hold a hearing on the question of the correctness of its administrative interpretation.[28/] In Leighton v. Securities and Exchange Commission, C. A. 2, No. 26,458, Nov. 3, 1960, certiorari denied, 365 U.S. 888 (1961), an attempt was made to review the Commission's failure to take action against the management of Paramount Pictures Corporation for alleged violation of its proxy rules.[29/] In both Peck and Leighton the Court of Appeals

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27/ Klastorin v. Roth, 353 F. 2d 182, 183 n.2 (C.A. 2, 1965); cf. J.I. Case Co. v. Borak, supra, 377 U.S. at 432; Securities and Exchange Commission v. Henwood, ['61-'64 Decisions] CCH Fed. Sec. L. Rep. ¶91,125 (S.D. Cal., 1961), modified on other grounds, 298 F. 2d 641 (C.A. 9), certiorari denied, 371 U.S. 814 (1962).

28/ See, Brief of Respondent in Support of Motion to Dismiss Petition for Review at pp. 1-2, Peck v. Securities and Exchange Commission, C.A. 2, No. 22,289, April 7, 1952.

29/ See, "Petition to review an Order of the Securities and Exchange Commission and/or to compel agency action unlawfully withheld by the S.E.C.," Leighton v. Securities and Exchange Commission, supra, C.A. 2, No. 26,458, Nov. 3, 1960.

for the Second Circuit summarily dismissed the petition for review without opinion.[30/]

In Leighton v. Securities and Exchange Commission, 95 App. D.C. 217, 218, 221 F. 2d 91, 92, certiorari denied. 350 U.S. 825, rehearing denied, 350 U.S. 905 (1955), this Court dismissed a petition to review an alleged order of the Commission, refusing to comply with the petitioner's demand that the Commission "investigate and regulate the issuance and sale . . . of travelers checks, contending they are securities within the meaning of the Securities Act of 1933." This Court held:

> "Were we to assume that the action of the Commission in declining to entertain petitioner's complaint, or to investigate the matters pressed by him, constituted an order of the Commission nevertheless it would be one within the discretion of the Commission under Section 20 of the Securities Act and, in any event, not such an order as would be reviewable by this court under Section 9(a) of the [Securities]Act. See Crooker v. Securities and Exchange Commission, 1 Cir., 161 F. 2d 944, 949." (Footnote omitted.)

The provisions of the Securities Act referred to in the Leighton opinion are in all relevant respects comparable to the sections of the Securities Exchange Act which relate directly to the instant matter.[31/]

30/ These determinations are consistent with an earlier holding by the Court of Appeals for the Second Circuit that a denial of "a request to amend a rule of the Commission" is "not a proceeding within the meaning of section 25(a)" of the Securities Exchange Act. Third Ave. Ry. Co. v. Securities and Exchange Commission, 85 F. 2d 914, 915 (C.A. 2, 1936).

31/ Just as in Section 20 of the Securities Act, 15 U.S.C. 77t, the language of Section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e), specifically provides that the question of statutory enforcement through institution of an injunctive action is a matter within the Commission's discretion. The jurisdictional grant of Section 9(a) of the Securities Act, 15 U.S.C. 77i(a), is, if anything, broader than that of Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a), since "any person aggrieved" by an "order" may seek review under the former provision, while under the terms of the latter he must also have been a "party" to a "proceeding."

Questions similar to those raised by the present petition were also decided in Crooker v. Securities and Exchange Commission, 161 F.2d 944 (C.A. 1, 1947), which was relied upon by this Court in Leighton, supra, 95 App. D.C. at 218, 221 F. 2d at 92. There the Court of Appeals for the First Circuit dismissed a petition for review of an order by which the Commission had accelerated the effective date of a registration statement under Section 8(a) of the Securities Act of 1933. The petitioner had sought unsuccessfully to have the Commission take administrative action to prevent the registration statement from becoming effective. The court held, 161 F.2d at 949:

> "If the intent of this prayer is to obtain from this court a decree directing the Commission to institute a proceeding under §8(d) looking toward a stop order suspending the effectiveness of the registration statement, it is clear that no such power is conferred upon this court. The language of §8(d) is permissive merely, conferring administrative discretion upon the Commission to institute such a proceeding 'if it appears to the Commission' that a registration statement is false or misleading. Cf. Jacobsen v. National Labor Relations Board, 3 Cir., 1941, 120 F.2d 96, 99, 100. For the same reason we are without power to direct the Commission, at the instance of a private petitioner, to make an investigation under §20(a) or to institute injunction proceedings under §20(b)."

The foregoing cases are fully in accord with the many rulings of this and other courts holding the exercise of administrative discretion to institute an action in court, initiate administrative proceedings or otherwise to take action to enforce the law is not a matter which may properly be reviewed by the courts. See, e.g., Powell v. Katzenbach, 123 App. D.C. 250, 359 F. 2d 234 (1965), certiorari denied, 384 U.S. 906, rehearing denied, 384 U.S. 967 (1966); Division 1267, Amalgamated Association v. Ordman, 116 App. D.C. 7, 320 F. 2d 729 (1963); Retail Store Employees Union Local v. Rothman, 112 App. D.C. 2, 298 F. 2d 330 (1962);

Goldberg v. Hoffman, 225 F. 2d 463 (C.A. 7, 1955); Moses v. Kennedy, 219 F. Supp. 762 (D.D.C., 1963). In these areas administrative officers and agencies must necessarily have wide discretion; they are not required to act in every case that may come to their attention but are merely enabled to do so. See National Labor Relations Board v. Indiana and Michigan Electric Co., 318 U.S. 9, 18 (1943).

While the Medical Committee recognizes the broad enforcement discretion granted to the Commission under the Securities Exchange Act, it argued in response to the Commission's motion to dismiss that the existence of administrative discretion does not preclude all judicial review (Mem. 15-24). Thus, while the Medical Committee admitted that it is not entitled to obtain review of the Commission's exercise of discretion whether to take enforcement action, it urged that this Court has jurisdiction to review what it considered to be a non-discretionary, "threshold" legal issue--whether the Commission's "refusal to take action against Dow resulted 'from a misunderstanding of the law'" (Mem. 19) and it referred to a "long line of cases" which, it asserted, has permitted review of "threshold legal questions" (Mem. 16).

In each of the cases relied upon (Mem. 18-19), if certain conditions were present the administrative agency was required under law

to make a discretionary decision;[32] in that context, there has been judicial review of an agency's determination as to whether those conditions were present.[33]

In the situations cited, however, where an agency may have erroneously refused to consider a matter which it was in fact required to consider, the private party would otherwise have had no remedy. Here,

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32/ Thus, in McGrath v. Kristensen, 340 U.S. 162 (1950), the controversy involved "the legal right of the alien to be considered for suspension" of deportation, 340 U.S. 169; and judicial review was found appropriate only because the claimant had "such status as entitles him to consideration" (emphasis added), 340 U.S. at 171; and the Court in Kristensen recognized Perkins v. Elg, 307 U.S. 325 (1939), to involve a comparable situation, 340 U.S. at 169-171. Similarly, in Office Employes International Union v. National Labor Relations Board, 353 U.S. 313 (1957), the right of a union to be heard on unfair labor practice complaints it had filed was explicitly upheld. And in Interstate Commerce Commission v. Humboldt Steamship Co., 224 U.S. 474 (1912), the Court affirmed the decision of the Court of Appeals noting that "the Commission refused to proceed at all, though the law required it to do so; and to so do as required--that is, to take jurisdiction, not in what manner to exercise it--is the effect of the decree of the Court of Appeals . . .," 224 U.S. at 485 (emphasis added).

33/ In Perkins v. Elg, supra, the Secretary of State had found that "he was without authority to issue . . . [a passport] because . . . [plaintiff] was not a citizen of the United States," 307 U.S. at 328, and the Court upheld judicial review to consider his authority to act in the circumstances, 307 U.S. at 349-350. In McGrath v. Kristensen, supra, the question sought to be reviewed similarly involved "a statutory prerequisite to the Attorney General's exercise of his discretion . . . ." 340 U.S. at 165. Likewise, in Interstate Commerce Commission v. Humboldt Steamship Co., supra, the Court examined the scope of the agency's authority after "the Commission decided that it was 'without jurisdiction to make the order sought by complainant,'" 224 U.S. at 479. And in Office Employes International Union v. National Labor Relations Board, supra, it was held that since, with regard to its own employees, a labor union was within the definition of an "employer" under the National Labor Relations Act, 353 U.S. 316-318, the Board had no discretion "to remove unions as employers from the coverage of the Act after Congress had specifically included them therein," 353 U.S. at 319.

the Medical Committee had the obvious remedy of itself seeking an injunction against violation of the proxy rules by Dow rather than seeking a ruling by this Court that the Commission's alleged interpretation was incorrect. See J. I. Case v. Borak, 377 U.S. 426 (1964); Studebaker Corp. v. Gittlin, 360 F. 2d 692 (C.A. 2, 1966).

Although the Medical Committee asserts "substantive rights" in the present matter comparable to those which existed in the cases it cites (Mem. 42), it has provided not a single authority which even broadly implies that it, or any other person, may compel the Commission to exercise its discretion in an enforcement matter. The cases we have discussed, supra, pp. 22-25, unequivocally demonstrate the absence of any such right. And the Supreme Court has held that where, as here, discretion is unqualified, judicial review is unavilable. Thus in Schilling v. Rogers, 363 U.S. 666 (1960), review was sought of an administrative decision that the petitioner was not eligible under the Trading With the Enemy Act for the return of property vested in the alien property custodian. The relevant statute provided that the appropriate federal officer "may return any [such] property" when certain conditions, relating to the nature of the claimant, existed, and the Director of the Office of Alien Property had concluded that the claimant did not meet the prescribed standards. As in the case at bar, the petitioner in Schilling argued "that even though he might not be entitled to judicial review of an adverse administrative determination on the merits of his claim" because of its discretionary character, he would nevertheless be entitled to review of the error of law he asserted had been made "on the issue of his eligibility,"

(original emphasis). In fact, the petitioner in Schilling expressly relied upon McGrath v. Kristensen, one of the cases emphasized by the Medical Committee, see nn. 32-33, supra. But the Supreme Court ruled that the very distinction which the Medical Committee advances, and for which it cites McGrath and similar authorities, may not properly be made where, as here, the discretion is granted in "permissive terms." See 363 U.S. at 674-675. In such cases, the Supreme Court held, the limitation expressed in the Administrative Procedure Act which bars judicial review where "agency action is by law committed to agency discretion" is applicable. 363 U.S. at 670, 674. A similar principle was applied in Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-318 (1958). And cf. Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 413 (1958) (per curiam);[34/] and Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 106 (1948).[35/] And in many other cases the same principle has been applied to hold that a grant of discretion which is couched in permissive terms renders unreviewable the agency's determination whether discretion should be exercised. See, e.g., United States v. Walker, 409 F. 2d 477, 480 (C.A. 9, 1969); Knight Newspapers, Inc. v. United States, 395 F. 2d 353, 358 (C.A. 6, 1968); Heffelman v. Udall, 378 F. 2d 109, 112 (C.A. 10), certiorari denied, 389 U.S.

34/ ". . . the [Federal Trade] Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

35/ "Where Congress has authorized review of 'any order' or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review."

926 (1967); Balanyi v. Local 1031, Internat'l Bro. of Electrical Workers, 374 F. 2d 723 (C.A. 7, 1967); Chernock v. Gardner, 360 F. 2d 257, 259 (C.A. 3, 1966); Ferry v. Udall, 336 F. 2d 706, 712 (C.A. 9, 1964), certiorari denied, 381 U.S. 904 (1965); United States v. Wiley's Cove Ranch, 295 F. 2d 436, 440-441 (C.A. 8, 1961).

The authority granted the Commission by Sections 21(a) and 21(e) of the Securities Exchange Act, supra, p. 18, could hardly be more permissively phrased. As the Court of Appeals for the Eighth Circuit has pointed out, these are grants of authority ". . . in which the Commission has been given absolute discretion as to exercise and exclusive judgment as to field and scope," so that

> "[i]t is an area in which an individual may make request of the Commission, but in which there is no basis for him to make demand. What is involved is wholly internal administrative power and function, which the courts have no jurisdiction to compel the exercise of."

Dyer v. Securities and Exchange Commission, 291 F. 2d 774, 781 (C.A. 8, 1961) (demand for investigation of alleged proxy-rules violation).[36/]

And this Court in Leighton, supra, 95 App. D.C. 217, 221 F. 2d 91, properly applied the principle that was later enunciated in

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36/ Although the Medical Committee, in response to the Commission's motion to dismiss this petition, asserts "substantive rights" in this matter (Mem. 42), in initially seeking the aid of the Commission the Medical Committee appeared to have understood that consideration of its letters by the staff and by the Commission was not a matter of right. See letter dated February 3, 1969, ("request a staff review. . ."; "request an oral argument before the Commission itself")(17a) and letters dated February 28, 1969 ("renew our request that the decision . . . be reviewed by the Commission" (24a); "renew our request that the decision . . . be reviewed by the Commission" (25a); "we request that the Commission review the decision . . . and take the necessary steps to compel Dow to include the proposal . . ." (26a) and "request that the Commission take appropriate action to compel . . ." the proposal's inclusion in the proxy statement (31a)) (emphasis added).

Schilling when it held that the Commission's investigatory discretion--which is, in terms, identical to its enforcement discretion--was of a character sufficient to render inapplicable both the specific Securities Act review provision and the judicial review provisions of the Administrative Procedure Act:

> "The discretionary character of the Commission's action [as with respect to the Securities Act provision] likewise removes it from Section 10 of the Administrative Procedure Act, which excepts from its provisions for judicial review agency action committed by law to agency discretion." 95 App. D.C. at 218, 221 F. 2d at 92 (emphasis added). 37/

In Curran v. Laird, C.A. D.C., No. 21040 (Nov. 12, 1969) (en banc), this Court, relying upon its decision in Leighton (Slip Op. at 13 n.16), reaffirmed its conclusion ". . . that there is a narrow band of matters that are wholly committed to official discretion

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37/ The judicial-review provisions of Section 10 of the Administrative Procedure Act of 1946, which, as codified, now comprise Chapter 7 of Title 5 of the United States Code, were designed to be a general restatement of recognized principles of judicial review, Attorney General's Manual on the Administrative Procedure Act, 93 (1947), and the introductory clause of that section, now codified as 5 U.S.C. 701 (which denied review ". . . so far as . . . agency action is by law committed to agency discretion . . ."), was intended "to restate the existing law as to the area of reviewable agency action," id. at p. 94. See Administrative Procedure Act, Legislative History, 79th Congress (1944-46), S. Doc. No. 248, 79th Cong., 2d Sess. (1946), at pp. 38 (Senate Judiciary Committee Print), 83-84 (House Hearings), 224, 229 (views of the Attorney General as set forth in the Senate Committee Report). Thus, it is not surprising that the principle of nonreviewability that was applied by this Court in Leighton and by the Supreme Court in Schilling had been recognized by the Supreme Court prior to the enactment of the Administrative Procedure Act. See, e.g., Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470, 489 (1941). As the House Committee stated in its report, as reprinted, S. Doc. No. 248, supra p. 233 at 275: "Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning."

. . ." (Slip Op. at 15). This Court there noted, "Not all operations of government are subject to judicial review, even though they may have a profound effect on our lives" (Slip Op. at 18)(footnote omitted). In Curran, supra, the president of the National Maritime Union brought an action seeking enforcement of the Cargo Preference Act, 10 U.S.C. 2631. Curran contended that the Act provided that military cargo must be shipped on "available American ships" before resort is had to foreign vessels (Slip Op. at 9). The Secretary of Defense had ordered the utilization of foreign flag ships to carry American military cargo. In response to appellant's contention that this Court should order the Secretary to "consider" the national defense reserve fleet as available American ships, this Court noted:

> "This court cannot sit in judgment to review a determination which involves appraisals like those outlined. The manifest difficulties cannot be obviated by construing the statute as requiring only that the authorities "consider" the feasibility of employing the reserve fleet ships for transporting military cargoes. There is no satisfactory exit once the judiciary crosses the threshold and enters the domain of these matters. Unless our determinations are to be merely precatory, a decision that Military Sea Transportation Service or the Department of Defense must 'consider' using mothballed ships necessarily invites future litigation concerning first the fact of such consideration vel non, and then whether the consideration has sufficient rationality to escape condemnation as an empty formality." (Slip Op. at 17-18.)

Review in the present case would similarly be inappropriate, for any ruling made by this Court would have little if any application to future manifestations of the continuing controversy between the Medical Committee and Dow. Only where a shareholder and management are at odds with respect to a specific proposal to be considered by shareholders at a corporate meeting yet to be held can it be concluded that a case or controversy exists. Here, there is the possibility that

the Medical Committee might vary its proposal, perhaps because of changed circumstances, or that Dow might not refuse to include the proposal, or even that the Commission in the meantime might find that the public interest in fair corporate suffrage has required a change in the standards set forth in its rules. Assuming, nevertheless, that this Court should rule that Dow's omission violates the proxy rules and directs that the Commission act in conformity with that view, or that this Court should direct the Commission to make a determination as to whether Dow has violated the proxy rules, the Commission, as the Medical Committee itself recognizes (Mem. 16, 24), would in no event be bound to take enforcement action. Moreover, in any enforcement action that might be brought, whether by the Commission or by the Medical Committee, Dow would presumably be entitled to challenge a ruling of this Court on the applicability of the rules to its last year's proxy material in an evidentiary hearing that the present petition for review seems calculated to avoid.[38/]

4. The Commission Has Issued No Declaratory Ruling.

In Leighton, supra, 95 App. D.C. 217, 221 F. 2d 91, as is clear from the Commission's brief in that case, it was disagreement with the petitioner's interpretation of law, rather than some other form of

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38/ The Medical Committee seems plainly to consider this proceeding to be a substitute for an action against Dow in connection with future proposals (Mem. 42-47). Thus it apparently hopes that a ruling by this Court will dissuade Dow from defending its position in the future. The Medical Committee expressly contends that the "inconvenience" to it of having to risk "pretrial discovery, pretrial motions practice, and possibly a trial" is an adequate basis for a "'pragmatic' and 'realistic' approach" that would plainly deny those procedures to Dow, which may not consider them to be inconvenient at all (Mem. 45-46).

enforcement judgment, which was the basis of the Commission's refusal to act.[39/] The same was true with regard to the Peck decision in the Second Circuit, noted supra, p. 9. Unlike the case at bar, Mr. Peck had obtained "the Commission's, as distinguished from the staff's statement that the Commission agrees with the management's position in this proxy controversy."[40/] These are therefore a fortiori authorities in requiring dismissal of this petition for review,[41/] since here the minute of Commission action (App. 46a) shows only that the members of the Commission decided to raise "no objection" to the course of action that Dow intended to follow--the omission of the Medical Committee's proposal from the management proxy materials. The minute does not set forth the reasons upon which that determination was made or indeed whether members of the Commission reached that result for the same reasons. Consequently, no inference concerning the basis upon which the

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39/ See, Brief for Respondent in Support of Motion to Dismiss Petition for Review (passim), Leighton v. Securities and Exchange Commission, supra, 95 App. D.C. 217, 221 F. 2d 91.

40/ See, Brief of Respondent in Support of Motion to Dismiss Petition for Review at p. 7 n.2, Peck v. Securities and Exchange Commission, supra, C.A. 2, No. 22289, April 7, 1952.

41/ We do not think it unfair to point out a basic inconsistency in the Medical Committee's approach to per curiam opinionless decisions of federal courts as compared with opinionless decisions of federal administrative agencies. In response to the Commission's citation of two unreported decisions of the Second Circuit involving similar issues to those herein raised by the Medical Committee, petitioner asserted that no reliance could be placed on those opinions because ". . . there is no way this Court can know what reasoning led to that result. This lack of information as to the reason for the Court's action is not remedied by respondent's reliance upon language appearing in the briefs of the parties in the case . . ." (Mem. 10 n.2). The same can be said of the Medical Committee's desire to draw unwarranted references from the Commission's minute of March 24, 1969.

Commission acted may reasonably be drawn. Accordingly, the contention that the Commission "necessarily" made a legal determination (Mem. 15), which is basic to the Medical Committee's claim that this Court has jurisdiction of its petition for review, is a patent non sequitur; particularly since, as the Medical Committee has acknowledged, the Commissioners may have acted on the basis of considerations other than the purported legal conclusion and it was within their discretion to do so (Mem. 15-16). It is well settled that except to the extent articulated by an agency as a basis for its action, the thought processes which underlie administrative decisions are not a proper subject for judicial inquiry. See United States v. Morgan, 313 U.S. 409, 422 (1941); Morgan v. United States, 304 U.S. 1, 18 (1938). And speculation with respect thereto is especially inappropriate here, since the Securities Exchange Act explicitly provides that the Commission's failure to take action shall not be construed to connote approval of activities which purport to comply with that statute's requirements, see Section 26, 15 U.S.C. 78z, and Rule 14a-9(b), 17 CFR 204.14a-9(b), which specifically applies this doctrine to activities relating to proxy solicitations.

Moreover, even if it were assumed that the Commission, in the manner suggested by the petition for review, has rendered an interpretation of its proxy rules, it is an informal advisory opinion and this Court has recognized that informal advisory opinions are not the proper subject of judicial review. In Helco Products Co., Inc. v. McNutt, 78 App. D.C. 71, 137 F. 2d 681 (1943), this Court upheld the dismissal of a complaint for a declaratory judgment filed after

plaintiff had received an administrative interpretation, which it regarded as erroneous, that actions it proposed to take would violate the Federal Food, Drug and Cosmetic Act. This Court observed, 71 App. D.C. at 74, 137 F. 2d at 684:

> "To permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue (footnote omitted).

The distinction recognized in Helco between unreviewable informal advisory opinions and reviewable final agency action plainly has continued vitality. See Abbott Laboratories v. Gardner, 387 U.S. 136, 151 (1967). And see, First Savings and Loan Association of the Bahamas, Ltd. v. Securities and Exchange Commission, 358 F. 2d 358, 359, 360 (C.A. 5, 1966), where it was pointed out that a letter from the Chief Counsel of the Commission's Division of Corporation Finance stating

> "Pursuant to your request, the matter has been submitted to the Commission and the Commission has authorized me to inform you that, in their opinion, the exemption contained in Section 3(a)(5) is not available to the Association,"

constituted only "an informal reply from the Commission," which did not amount "to a declaratory order."[42/]

The favorable impact of advisory opinions on the securities bar is well recognized. The procedure whereby the Commission, or its staff, renders an interpretation of the federal securities laws has enabled practicing attorneys to fulfill their obligation to their clients.

42/ See also, Standard Fruit & Steamship Co. v. Midwest Stock Exchange, 178 F. Supp. 669, 675 (N.D. Del., 1959), where the court noted that this Commission's determination not to bring an enforcement action constituted an informal or advisory action and not the entry of a formal order from which review might be taken.

As the second Hoover Commission noted, this procedure of informal advisory opinions has been "most successfully used" by the Securities and Exchange Commission.[43/] As one of the leading authorities on securities law has noted:

> "There is no formal procedure for obtaining Commission review of staff positions. But the Commission will sometimes grant an informal hearing."

III Loss, Securities Regulation 1896 (1961), as supplemented, VI Loss at 4026 (1969). Professor Loss has noted that the beneficial service performed by the Commission in rendering advisory opinions would be short-lived if this informal procedure became more formalized:

> "The more formalized the widely used interpretive service becomes, with arguments and perhaps exchange of memoranda or briefs on 'appeal' to the Commission, the more cautious both Commission and staff are apt to become in expressing themselves in advance as to the applicability of the acts and rules to particular factual sections" (ibid.) [44/]

As should be apparent from the foregoing discussion, we do not contend that action of the Commission must be embodied in a document labeled "order" to be reviewable. The lack of such formality, however, together with the lack of any adjudicatory procedure established to enforce the proxy rules by administrative directive, make clear

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43/ Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedure 189 (1955).

> "Because declaratory orders have been used relatively little, advisory opinions have been the mainstay for supplying the need for authoritative advice concerning contemplated transactions. Quantitatively, the SEC has been outstanding, as its staff answers thousands of informal inquiries each year about the interpretation and application of the statutes and regulations administered by the SEC." 1 Davis, Administrative Law Treatise Section 4.09 (1958) (footnote omitted).

44/ As Professor Davis has noted, these advisory opinions presently "differ from declaratory orders in their lack of reviewability . . ." 1 Davis, Administrative Law Treatise Section 4.09 (1958).

that the Commission had no thought of exercising its discretion to issue a declaratory ruling.[45/] This is apparently recognized by petitioner (Mem. 10). Accordingly, Red Lion Broadcasting Company v. Federal Communications Commission, 395 U.S. 367, 372-373 n.3 (1969), upon which the Medical Committee relies (Mem. 33), is in no way applicable, since, as the Supreme Court there pointed out, in that case the agency involved acted under the authority of the Administrative Procedure Act and its own rule providing for a declatory ruling. See 5 U.S.C. 554(e), 47 CFR §1.2, and 29 Fed. Reg. 10415, 10416 (July 25, 1964).[46/] Furthermore, in Red Lion, the petitioner had been directed, under risk of substantial penalty, to conform its activities to the agency's view of what the law required; here the Commission's determination to take no action neither creates obligations nor denies rights to any person. Banzhaf v. Federal Communications Commission, ___ App. D.C. ·

45/ The Securities Exchange Act does not in terms authorize this Commission to grant a declaratory judgment. The Administrative Procedure Act, as codified in 5 U.S.C. 554(e), provides only that the agency "may issue" such an order "in its sound discretion." There is nothing here to suggest that the Commission was purporting to issue a declaratory order in this case. In any event, the discretionary character of the authority to issue declaratory orders places an agency's refusal to grant declaratory relief beyond judicial review, see pp. 33 through 36, supra.

46/ The Supreme Court did not, as suggested by the Medical Committee, find the absence of procedural formalities "simply beside the point" (Mem. 34). It merely observed that the agency was authorized to make a declatory order in the circumstances, and that the petitioner had waived "any objection it might have had to the procedure of the adjudication" by having "adopted as its own the Government's position that this was a reviewable order . . . ." 395 U.S. at 372-373 n.3.

____, 405 F. 2d 1082 (C.A. D.C., 1968), certiorari denied sub nom. Tobacco Institute, Inc. v. Federal Communications Commission, 38 U.S. Law Week 3117 (Oct. 13, 1969) (U.S., No. 47), is wholly inapposite since, in direct contrast to the instant case, Banzhaf involved a petition for review of an unquestioned exercise of rulemaking authority and imposed legal responsibilities upon regulated entities.[47/]

CONCLUSION

For the foregoing reasons the Commission's motion to dismiss should be granted.

Respectfully submitted,

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General Counsel

DAVID FERBER
Solicitor

RICHARD E. NATHAN
Special Counsel

HARVEY L. PITT
Attorney

December 1969

47/ See Television Station WCBS-TV, 9 F.C.C. 2d 921, 945-949 (1967), affirmed sub nom. Banzhaf v. Federal Communications Commission, supra. Procedural deficiencies in the agency's original action, 8 F.C.C. 2d 381 (1967), were held remedied by the agency's reconsideration, __ App. D.C. at __, 405 F. 2d at 1104.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Petitioner,

-against-

No. 23105

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

MOTION TO DISMISS PETITION FOR REVIEW

The Securities and Exchange Commission respectfully moves this Court for an order dismissing the petition for review filed by the Medical Committee for Human Rights because this Court lacks jurisdiction:

1. The Medical Committee is not a person aggrieved by any order issued by the Commission in a proceeding under the Securities Exchange Act to which the Medical Committee is a party;

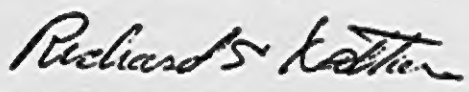
2. The petition for review relates solely to matters committed to Commission discretion by law;

3. The Medical Committee has suffered no legal wrong because of Commission action nor has it been adversely affected or aggrieved by Commission action within the meaning of any relevant statute;

4. Even if it were assumed that the matters raised by the petition are proper subjects for judicial review, this Court is not a court of competent jurisdiction under any relevant statute.

Respectfully submitted,

DAVID FERBER
Solicitor



RICHARD E. NATHAN
Attorney

Securities and Exchange Commission
Washington, D. C. 20549

Washington, D. C.
July 8, 1969

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEDICAL COMMITTEE FOR HUMAN RIGHTS, :

Petitioner, :

v. : Docket No. 23105

SECURITIES AND EXCHANGE COMMISSION, : AFFIDAVIT

Respondent. :

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

MATTHEW E. JAFFE, being duly sworn, deposes and says:

1) I am an attorney employed in the Division of Corporation Finance of the Securities and Exchange Commission since April 1967, and in the course of such employment I have become familiar with the facts underlying this proceeding.

2) On March 24, 1969, Courtney Whitney, Jr., Chief Counsel of the Division of Corporation Finance, instructed me to inform by telephone counsel for Dow Chemical Company ("Dow") and the Medical Committee for Human Rights ("Medical Committee") of the Commission's determination that day not to take any action if a certain proposal of the Medical Committee were omitted from Dow's proxy statement in connection with Dow's 1969 annual meeting. That same day, I called Mr. Jeffrey Bauman, counsel to the Medical Committee, and Mr. Walter Groening, counsel to Dow, and informed them of the Commission's determination. Subsequently, letters noting the Commission's determination were sent to these gentlemen.

3) Further affiant sayeth not.

Matthew E. Jaffe
MATTHEW E. JAFFE

Sworn to before me this 18th
day of December, 1969.

Juanita L. Ward
Notary Public

My Commission Expires May 31, 1974

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